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Vakil High Court,
SRINAGAR (Kashmir)

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Vakil High Court,
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QUINQUENNIAL DIGEST

CIVIL, CRIMINAL & REVENUE

1936—1940

VOLUME II

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Acquisition.

——*Acquisition—Assertion of personal claim against owner—If precludes claim for easement.*

It is true that a person who enjoys a right under the belief that he is an owner, does not acquire an easement. A right of easement is a right which is capable of being acquired in respect of other's land and not one's own. But the mere fact that the person claiming easement had previously filed a suit for specific performance on the basis of an agreement of sale alleged to have been executed in his favour affecting the land in respect of which the right of easement is claimed by him does not preclude him from claiming the easement, because an assertion of a personal right against the owner does not imply an assertion of a right in the property. It is only an equitable right which is remote from ownership. (*Niyogi, J.*) RAJU NAIDU *v.* MALAK. **I.L.R. (1939) Nag. 580=186 I.C. 155=12 R.N.187=1939 N.L.J. 297=A.I.R 1939 Nag. 197.**

——*Acquisition —Easement of necessity—Conditions of.*

An easement of necessity arises when immovable property is transferred by one person to another. It arises in favour of the transferee if the easement is necessary for enjoying the subject of the transfer, *i.e.*, when the property cannot be used at all without exercising it. It does not however arise where its exercise is merely necessary to the reasonable enjoyment of the property. The necessity set up must have been a necessity existing at the time of the transfer of the property. To establish an easement of necessity, it is not sufficient to show that if the easement is denied, the party claiming it will be put to inconvenience. (*Rowland, J.*) BALKRISHNA DAS *v* SHYAM SUNDER MANDAL. **172 I.C. 516=10 R.P. 335=A I R. 1937 Pat. 589.**

——*Acquisition—Essentials.*

For the acquisition of an easement along with other things it is essential that the dominant owner must be a fixed or ascertained person or body of persons capable of acquiring the right. Where the evidence shows that Sindhis in general had been making use of the land in question, *held*, that this could not establish a right of easement as Sindhis in general are a variable body of persons who in law are incapable of acquiring any right. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) PANEKHAN *v.* BANSHILAL. **1940 Mar. L.R. 122 (Civ.).**

——*Acquisition —Prescription —Conditions—Conscious assertion of right to easement during whole prescriptive period—Necessity to prove—Open exercise of rights establishing easement—Sufficiency.*

It is not the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him. A plaintiff may claim an easement and ownership in the alternative. If he shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, *prima facie*, he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was conciously asserting a right to an easement. A right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement. (*Beaumont. C.J. and Sen, J.*) RAU RAMA *v.* TUKARAM. **I.L.R.**

EASEMENT.

(1939) Bom. 140=183 I.C. 139=12 R.B. 59=41 Bom.L.R. 168=A.I.R. 1939 Bom. 149.

———*Acquisition—Prescription—Right of ryots to irrigate land through channel in another's lands—If can be acquired—Enjoyment for over 20 years—Effect—Proof of right to water as against Government—If condition precedent to declaration of right.*

A right to irrigate his punja land through a channel in the adjoining nanja land of another ryot can be acquired by a ryot by prescription. If such right has been enjoyed for over 20 years, he can get a declaration of such right. It is not necessary that the plaintiff should establish a right to water against the Government for this purpose. (*Lakshmana Rao, J.*) ARAVAMUDHACHARIAR *v.* MUNISWAMI UDAYAN. **1937 M.W.N. 920.**

———*Acquisition—Proof*—Animus *in exercise of right—Necessity—Claim for right of easement—Evidence showing plaintiff to be owner of land—Effect.*

In order that a plaintiff should prove the right to an easement, he must show the exercise of that right with the necessary *animus* throughout the statutory period. The question of *animus* is a question of fact to be proved by evidence. Though a plaintiff in a case to establish right of easement may in his pleadings raise inconsistent pleas, yet if in the witness box he leads evidence to show that he is the owner of the land over the statutory period or some part of it, he clearly destroys his case which is dependent upon his showing that he is not the owner of the land over the statutory period and has not claimed the rights of owner but the exercise of the rights over the land of another. In such a case the plaintiff must necessarily fail on both the grounds as one plea is fatal to the other. (*Davis, J C. and Weston, J.*) KHANCHAND JETHAMAL *v.* NARAINDAS PAHLJRAI. **I.L.R. (1939) Kar. 307=181 I.C. 961=11 R.S. 248=A.I.R. 1939 Sind 110.**

———*Acquisition—Right of pasturage—Inhabitants of village—How may acquire.*

A right of pasturage by virtue of a lost grant cannot be established by the inhabitants of a village as they are a variable number of persons. Such a right cannot also be established by prescription under S. 26 of the Limitation Act, inasmuch as to establish such a right it must be shown that it has been peaceably and openly enjoyed by the persons claiming it without interruption for 20 years. That might be so with regard to some of the villagers but could not be so in the case of all the inhabitants. It is clear therefore that the only right of easement which can be claimed in a case like this is the right of easement by custom. To establish their right of custom, it must be shown that the custom is immemorial, reasonable, and continued without interruption since its origin, certain in respect of its nature, as well as in respect of locality where it is alleged to obtain and the persons whom it is alleged to affect. (*Jack, J.*) ABDUL HOSAIN *v.* SADAI GOBINDA DEB. **42 C W.N. 1102.**

———*Acquisition—Right to overhang branches of tree over neighbour's land—Nature of—If an easement acquirable—Right of owner of land to cut off everhanging branches—Nuisance—Abatement of.*

EASEMENT.

It is settled law that an owner of land can cut the branches of trees standing on his neighbour's land which overhang on his land. The fact that the two plots of land were once held in common ownership and the plot with the trees thereon with the branches overhanging on the other is transferred by partition or sale makes no difference so far as the application of the rule is concerned. To have the branches of a tree overhang on the land of another is not in the nature of a right of easement, and it cannot be acquired by prescription at common law or statute either under English law or Indian law. In other words there is no right of easement or customary right to have the branches of a tree overhang on another man's land. To allow the branches of one's tree to overhang on another's land is to commit a nuisance which that another has a right to abate by cutting-off the branches. (*Venkataramana Rao, J.*) RANGASWAMI GOUNDAN *v.* ARUMUGHA GOUNDAN. **163 I C. 799=9 R.M 61=44 L.W. 429=1936 M.W.N. 879=A.I.R. 1936 Mad. 702=71 M.L.J. 296.**

[Reversed on Letters Patent Appeal in (1938) 1 M.L.J. 510.]

———Acquisition—Right to throw filthy water on neighbour's land—If can be acquired—Mode. *See* EASEMENTS ACT, S. 15. **(1937) 2 M.L.J. 350.**

———*Acquisition—Tree standing on plot of land of one—Branches overhanging land of neighbour—Right of former to prevent latter from cutting overhanging branches—Adjacent plots of land belonging to same owner—Sale of one with old tree thereon—Branches overhanging on land not sold—Right of vendor to cut off—Vendee's right to prevent cutting by vendor.*

No right of easement can be acquired in respect of a tree which gradually projects over his neighbour's land insensibly and by slow degrees. The owner of tree has consequently no right to prevent a person lawfully in possession of land into which or over which its roots or branches have grown, from cutting away so much of them as project into or over his land. But it is a settled maxim that a grantor shall not derogate from his grant. Where an owner of two adjacent plots of land transfers or sells one of them together with a tree standing thereon, which is not a tiny plant or sapling, but an ancient tree of about 100 years old whose growth has practically ceased, it must be held that a right to project the existing boughs of the tree over the vendor's land is also transferred to the vendee. To allow the transferor to cut-off the branches overhanging his land (which has not been transferred) would be to violate the maxim that the grantor shall not derogate from his grant. If he intends to reserve to himself the right to lop off the projecting branches, he should expressly reserve. It is not necessary that the vendee should be given under the sale-deed an express right to project the branches, in order to entitle him to prevent the vendor from cutting-off the branches. On appeal from, 71 M.L.J. 296. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ARUMUGHA GOUNDAN *v.* RANGASWAMI GOUNDAN. **182 I.C 321=12 R.M. 62=1938 M W.N. 282=47 L.W. 324=A.I.R. 1938 Mad. 511=(1938) 1 M.L.J. 510.**

Appurtenant land.

———*Appurtenant land—Land opposite to the house—If appurtenant land.*

Land appurtenant to a residential house need not be actually adjoining the house. Where a tenant uses certain land opposite to his house but on the other side of a public way for the purposes of tethering his cattle, such land can be regarded as appurtenant to his house. (*King, C. J.*) SPECIAL MANAGER. COURT OE WARDS, BALRAMPUR ESTATE *v.* SHYAM LAL. **12 Luck. 279=162 I.C. 836=8 R O. 411=1936 O.W.N. 536=1936 R.D. 273=1936 O.L.R. 330=A.I.R. 1936 Oudh 324.**

———Claim to injunction by person in occupation of property—Maintainability—Enquiry into title of plaintiff in property—If arises. *See* COURT-FEES ACT, S. 7 (IV) (C) AND (D). **(1940) 2 M. L.J. 655.**

Customary right.

———Customary right and easement—Distinction between. *See* CUSTOM—CUSTOMARY RIGHT. **66 C.L.J. 270.**

———*Customary right — Proof — Immemorial user, if necessary—Unreasonableness of custom —Test.*

In order to establish a customary right it is not necessary to show that it has been exercised since time immemorial. It is sufficient to show that it has been openly enjoyed for such a length of time as suggests that, by agreement or otherwise, the usage has become a customary law of the locality. It is not necessary to prove enjoyment of the right for a period of 20 years. Where therefore the Mahomedans have been immersing their tazias at Muharram in two ghats of a tank for such a length of time as to suggest that the usage has become the customary law of the place, they have a customary right to use the ghats for immersing their tazias. There is nothing unreasonable in the custom and it is sufficiently certain and invariable. The mere possibility that the number of tazias immersed may eventually increase so much as to prove a nuisance, is too remote to make the custom unreasonable. (*Pollock, J.*) SABASHA *v.* BABA NARAYAN. **A.I. R. 1938 Nag. 177.**

———Customary rights—Right of pasturage by long user—Villager's right to graze cattle over lands of adjacent village—Owner not their landlord—Enforceability of such rights. *See* CUSTOM—VALIDITY. **63 Cal. 851.**

———*Customary right—Right to use ghats of tank for immersing tazias.*

The right to use the ghats of a tank for the purpose of immersing tazias at muharram is a customary right and not an easement. (*Pollock, J.*) SABASHA *v.* BABA NARAYAN. **A.I.R. 1938 Nag. 177.**

———Customary right—Tank attached to Hindu temple in control of Hindus and enclosed—Right of Mahomedans in general to bathe—Casual bath —Effect of. *See* RECORD OF RIGHTS—CONSTRUCTION. **18 Pat.L.T. 348.**

———*Customary rights—Tenant's right to graze cattle on and take wood, etc., from forest and waste land of zamindar—Land not communal land —Right exercised on payment of charges—Long user—Effect—If customary right.*

The enjoyment of a right claimed to exist under an alleged custom must be enjoyed as of

right, that is to say, all acts must be done under or by virtue of the custom. In order to establish the custom, all acts must have been done without violence, without stealth or secrecy, or without leave or license asked for or given either expressly or impliedly from time to time. No act which can be ascribed to a license can ever support a claim of custom. A zamindar is the owner of the forest and of the waste land lying within his zamindari, and as proprietor can permit his tenants to graze their cattle on land which is not the communal land of the village, and to take dead wood, etc, from the forest or waste land on payment of certain charges prescribed by him. But that is purely a matter of contract between the zamindar and the tenants. A right which can be so acquired on payment of fees or charges can hardly be regarded as a customary right, notwithstanding that the right has been exercised for a long series of years. (*Stone, C.J. and Niyogi, J.*) BAHORAN *v.* LAL BHUWANPAL SINGH. **20 N.L.J. 131.**

———*Customary right—Villagers' right to collect fuel and burn* Holi *on the land of the defendant— If can be recognised—If unreasonable.*

Where the residents of a particular locality claimed a customary right of easement to go over the land of the defendant, to collect firewood and burn *Holi* and perform some ceremonies there and where such right is proved to have been exercised from time immemorial, it was held that the easement was not unreasonable and could be recognized by the Courts. (*Bennet and Verma, JJ.*) LAKHMICHAND *v.* MOTI LAL. **180 I C. 233 =11 R.A. 432=1938 A.L.J. 1243=1939 A.W.R. (H.C.) 4=A.I.R. 1939 All. 165.**

———*Customary right—Decree for injunction against owner of servient tenement—Execution— Questions to be considered by Court.*

Where the owner of a dominant tenement who has obtained an injunction restraining the owner of the servient tenement from building his house beyond a certain height and within a certain distance of the decrce-holder's house, seeks to execute his decree by the demolition of the additions alleged to have been made to his house by the judgment-debtor, the real question is whether the owner of the servient tenement has infringed the restrictions imposed on him by the original decree. If he has, he must be made to comply with the decree passed against him. The questions whether the decree-holder has rebuilt his house and has increased the burden on the servient tenement are not material questions. (*Jai Lal, J.*) RALLA RAM *v.* KHAZAN SINGH. **173 I. C. 57=10 R.L. 389=39 P.L.R. 712=A.I.R. 1937 Lah. 419.**

Easements of necessity.

———*Easement of necessity—Right to—Partition of joint property,*

In order to give an easement of necessity where partition has been made of joint property of several persons, the easement must be necessary for enjoying the share of one of the former joint owners. (*Addison, Ag. C.J. and Din Mohammad, J.*) SHEO NATH *v.* MUGHLA. **179 I.C. 364=11 R.L. 571=40 P L.R. 787=A.I.R. 1938 Lah. 800.**

———*Easement of necessity—When can be granted.*

EASEMENT.

An easement of necessity cannot be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. When there are other ways for ingress and exit, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient. (*Addison, Ag.C.J. and Din Mohammad, J.*) SHEO NATH *v.* MUGHLA. 179 I.C. 364 =11 , 71=40 P.L.R. 787=A.I.R. 1938 Lah. 800.

Extinction.

———*Extinction—Imposition of additional burden—Effect of.*

The imposition of an additional burden does not have the effect of extinguishing the right of easement altogether, when the additional burden is separable from the original burden. (*Bhide, J.*) PARTAP SINGH *v.* GANESH DAS BHATIA. 179 I.C. 262=11 R.L. 549=40 P.L.R. 298=A I.R. 1938 Lah. 751.

———*Extinction—Unity of possession.*

Where the ownership of the two estates is not co-extensive and equal in validity—the dominant tenement being held for a term of years only and the servient tenement in full right of ownership —the acquisition of a right of way is not extinguished but is only suspended by unity of possession of the dominant and servient tenements. 50 Cal. 356, Rel. on. (*Mosely, J.*) TAN SIT SHAN *v.* U PO. NYUN. 1940 Rang L R. 93=185 I.C. 605 =12 R.R. 208=A.I.R. 1939 Rang. 421.

Grant.

———*Grant—Approval of plan by Municipality—Grant of easement over its adjoining lane—If implied.*

The approval of any person's plans for building does not necessarily imply that the Municipality intended to grant an easement over an adjoining lane belonging to it. (*Pandrang Row, J.*) MAHABOOB KHAN SAHIB *v.* GOVINDARAJULU NAIDU. 160 I.C. 955=8 R.M. 735=A.I.R. 1936 Mad. 142.

———*Grant—Reservation of right to revoke—Nature of right—If assignable.*

Where a person grants an easement of a right of way over his land to another and expressly reserves to himself the right to revoke it under certain conditions within a definite period and on payment of a particular amount, it is a reservation made for the beneficial enjoyment of his land. It is in the nature of a covenant running with the land and is capable of assignment, and a transferee of the land could enforce it. (*Niyogi, J.*) ANJUMAN MUFIDDUL ISLAM *v.* ZAL RUSTOMJI MADAN. 180 I.C. 204=11 R.N. 343=1939 N.L. J. 27=A.I.R. 1939 Nag 65.

———*Grant—Implied grant—Right of owner of trees to overhang branches on neighbour's land—If can be implied from mere grant of land with trees—Right to produce of overhanging branches.*

A right to overhang the branches of one's trees over the land of his neighbour may, no doubt, by apt words be granted. But such a grant cannot be implied from a grant of the land with the trees on it, because the result of allowing the branches to overhang over an unlimited and indefinite area of the neighbour's land would subject that land to a burden which would virtually deprive him of his right to use his land as owner.

EASEMENT.

But so long as the branches are allowed to overhang, the owner of the trees will also be the owner of the branches and the produce thereon, and it may be that the adjoining owner will have to permit the owner of the trees to take the produce. (*Venkataramana Rao, J.*) RANGASWAMI GOUNDAN *v.* ARUMUGHA GOUNDAN. 163 I.C. 799 =9 R.M. 61=44 L.W. 429=1936 M W.N. 879= A.I.R. 1936 Mad. 702=71 M.L.J. 296.

[Reversed in (1938) 1 M.L.J. 510]

———*Grant—Lost grant—Presumption against Government—When can be made.*

When a person prays the Court to presume a lost grant as against Government, it is reasonable to infer that such a grant cannot be presumed unless there is evidence of a user which would be sufficient to establish a right by prescription and against Government, that is to say, unless there is evidence of sixty years' user. At any rate, it is impossible to infer a lost grant on the basis of immemorial user when the evidence shows positively that fifty years ago no such grant had been made. (*Wadsworth, J.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* NARAYANASWAMI PILLAI. 162 I.C. 97=8 R.M. 943= 1936 M.W.N. 358=A.I.R. 1936 Mad. 692.

———*Grant—Lost grant—Ryotwari proprietor—Right to drain water brought for irrigation purposes on the higher land, into the lower—Nature of.*

If it is found that for a sufficiently long time, covering a period of over 30 years, all the water, both rain water as well as water brought on to the upper land by artificial means for agricultural purposes, is allowed to pass into the lower land without any interruption by the proprietor thereof, the Court will easily infer a custom and that the customary conditions of the locality require such user. The doctrine of lost grant can be invoked for the purpose of inferring such a custom. It is not necessary that the words "lost grant" or "customary user" should in so many words be pleaded. All that is necessary to be alleged in order to infer a doctrine of lost grant or a claim based on prescription is long, continual and peaceful possession. Where these incidents are found, the Court will presume a grant of the right. The fact that both the proprietors are ryotwari owners holding under the Government, a common landlord, is no bar to the acquisition of a title by prescription or lost grant, by one against another. The estate of the ryotwari proprietor is an estate in the soil and is heritable and alienable, and he has sufficient estate to support a grant of an easement. (*Venkataramana Rao, J.*) NAGARATHNA MUDALIAR *v.* SAMI PILLAI. 59 Mad. 979=164 I.C. 764=9 R. M. 178=44 L.W. 139=1936 M.W.N. 426=A.I. R. 1936 Mad. 682=71 M.L.J. 187.

Lateral support.

———*Lateral support—Adjacent-land—Right of support from—When available—Building on land—Owner's right of support from adjacent land.*

The natural right of support from neighbour's land is available only in respect of land in unburdened and natural state. An owner has got no right for the support of his building or of his land burdened with the additional weight of his building unless such a right has been acquired as an easement. If there is no easement to have the lateral support of his building on his neighbour's

land, the neighbour is within his rights to make excavations on his own land, and provided that he does not act negligently, he is not liable at all for damages caused to the building of his neighbour. (*R. C. Mitter, J.*) BENGAL PROVINCIAL RY. CO., LTD *v.* RAJANI KANTA DE. **63 Cal. 441 =165 I.C. 371=9 R.C. 394=62 C.L.J. 283=A. I.R. 1936 Cal. 564.**

Light and air.

——*Light and air—Injunction—When to be granted.*

Even though a right of easement of light and air is established, a person is not entitled to an injunction unless the disturbance of his easement appreciably and materially affects his enjoyment of the building in respect of which the easement is claimed. (*Rupchand Bilaram, Ag. J.C. and Lobo, A. J. C.*) HUKOMAL LAKHMI CHAND *v.* TARACHAND TOPANDAS. **173 I.C. 380=10 R.S. 209=A.I.R. 1938 Sind. 37.**

——*Light and air—Law as to—Reference to English statutes and decisions—Value of.*

In the case of a suit relating to an easement of light and air, reference to reported cases is necessarily of little value, because, whether or not the disturbance of an easement of light and air amounts to a nuisance, depends entirely on the facts and circumstances of each particular case. So also, as the law relating to easements in British India is governed very largely, if not entirely, by the Easements Act in those provinces to which it has been made applicable, it is of little practical use to refer to the provisions of the English statute and decisions in English cases, in a matter relating to easements. (*Lobo, J.*) ABDULLAH HAROON *v.* MUNICIPAL CORPORATION, KARACHI. **179 I.C. 884=11 R.S. 157=A.I. R. 1939 Sind 39.**

——*Light and air—Party wall—Windows or openings in—Easement of light and air through —Acquisition by prescription—Rule as to—One co-owner raising joint wall—Effect of—Building by one co-owner blocking up apertures—Permissibility.*

The principle [that easement of light and air through windows opened in a joint wall cannot be acquired by prescription] cannot apply where the whole wall to its full height is not proved to be joint. The party who wants the whole wall to be treated as a joint wall must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built, they cannot be blocked up unless there is an agreement to close them when the other house is raised and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already-acquired easement of light and air through the windows in the upper wall. (*Divatia, J.*) RATANGAVRI *v.* MANILAL MAHIPATRAM. **I.L.R. (1940) Bom. 140=187 I.C. 717=12 R.B. 476=42 Bom. L.R. 186=A.I.R. 1940 Bom. 153.**

——*Light and air—Plaintiff seeking injunction —Power of Court to direct enquiry as to damages.*

Where in a suit relating to an easement of light and air, the plaintiff seeks an injunction restraining the defendant from interfering with his right,

the Court is entitled, in a proper case, to order an enquiry as to damages, even though it holds that the plaintiff is not entitled to injunction. No such enquiry can however be ordered when the plaintiff has not proved any damage. (*Lobo, J.*) ABDULLA HAROON *v.* MUNICIPAL CORPORATION, KARACHI. **179 I.C. 884=11 R.S. 157=A.I.R. 1939 Sind 39.**

——*Light and air—Right of owner of dominant heritage—Infringement—What constitutes—Substantial damage.*

The owner of a dominant heritage has no absolute right to the access of light and air to windows and apertures, and is not entitled to compensation by way of injunction or otherwise for the disturbance of an easement, unless he has sustained substantial damage; that substantial damage must be a diminution of the value of the dominant heritage, or of the utility thereof, material interference with the physical comfort of persons using the dominant heritage, a material interference with the use of the dominant heritage in as beneficial a manner as it had been used before such interference. An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the house if it is a warehouse, a shop or other place of business. So also, to constitute an infringment of an easement of light and air, there must be a substantial privation of light and air enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. (*Lobo, J.*) ABDULLA HAROON *v.* MUNICIPAL CORPORATION, KARACHI. **179 I.C. 884=11 R.S. 157=A.I.R. 1939 Sind 39.**

Natural right.

——*Natural right—Higher and lower land—Right of owner of former to drain off water on to lower land—Nature and extent of.*

There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels such a right to drain off is an incidence of ownership of land and is not an easement to be acquired by user. The owner of the lower land is not entitled to deal with his land so as to obstruct the flow of water from the higher land. This principle applies not only to lands situate in the country but also to lands in towns. The owner of the higher land can collect the water falling on his land and let it out in a channel or through apertures in the bund, provided only that he does not do so to hurt or damage the lower land, in other words, the exercise of the right should not be made more burdensome to the owner of the lower land than it was before. But it is within the right of the owner of the higher land to introduce water which was foreign to the land, for example by procuring a pipe supply or draining another water shed or water which has come artificially therein. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) HANUMANTHAPPA *v.* SHADAKSHRAPPA. **17 Mys. L.J. 123=44 Mys.H. C.R. 105.**

———*Natural Right—Right of passage, or to light and air.*

The law does not know of any natural right apart from a right of easement with reference to a right of passage or right to light and air. No one can claim any natural right against another unless he establishes an easement to that effect. (*Pandrang Row, J.*) MAHA BOOB KHAN SAHIB *v.* GOVINDARAJULU NAIDU. **160 I.C. 955=8 R.M. 735=A.I.R. 1936 Mad. 142.**

———*Natural right—Right to discharge water on land on lower level.*

The owner of a plot of land on a higher level has, as a natural right and as an incident to the ownership of the plot, the right to discharge water upon an adjacent plot of land lying on the lower level. (*Fazl Ali, J.*) SHEOGULAM SINGH *v.* RAMBAHADUR SINGH. **174 I.C. 710=4 B.R. 479 =10 R.P. 545=A.I.R. 1938 Pat. 73.**

———*Nature of right—Enjoyment for lesser than statutory period—If can confer right of action against trespasser.*

Easements are not capable of being possessed and unless such rights have ripened into prescriptive rights recognized by law, mere enjoyment for anything less than the statutory period does not confer on the enjoyer a right to maintain an action against a trespasser interfering with his enjoyment. (*Radha Krishna, J.*) MADAROO KHAN *v.* MUNAWAR KHAN. **184 I.C. 870= 12 R.O. 169=1939 O.L.R. 677=1939 A.W.R. (C.C.) 261=1939 O.W.N. 992=1939 O.A. 800 =A.I.R. 1940 Oudh 111.**

———*Natural right—Right of owner of upper land to drain off surplus rain water to lower land —Nature and extent of—If an incident of ownership of land—Acquisition by user—If necessary.*

The right of the owner of a higher land to drain off its surplus rain water through the adjacent owner's ground is an incident of the ownership of land in this country, and need not be acquired by long user; and if the owner of the land at the lower level raises any obstruction to the natural flow of the water, he would be restrained if it causes or tends to cause damage to the owner of the land on the higher level. Although the flow must not be increased by artificial means, it is not necessary that the flow must be a flow permitted to go naturally over the whole surface. The owner of the superior tenement can, on the other hand, in the natural use of his property for draining or otherwise improving it, collect the water into one body and thus discharge it, and the owner of the inferior tenement is, without the positive constitution of any servitude bound to receive that body of water on his property. (*Rowland, J.*) RAJPATI NARAYAN SINGH *v* KIRIT NARAYAN SINGH **173 I.C. 599=10 R.P. 424=4 B.R. 299=18 Pat.L.T. 806=1937 P.W.N. 578=A.I.R. 1938 Pat. 71.**

Nature of claim.

———*Nature of claim.*

The claim in respect of an easement is not incompatible with a claim of ownership. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I. L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

Public pathway.

———*Public pathway—Presumption from user.*

Where a pathway has been used by all the residents of the village and on both sides of it abut houses of the residents of the village, the presumption is that the passage has been kept for the common use of the residents of the village and is, therefore, a public pathway. Under such circumstances there must be a presumption of dedication of the land under the passage for public pathway. User for any number of years is not necessary to establish a right to pass over the public pathway. User, on the other hand, is merely an evidence of original dedication in such cases. (*Jai Lal, J.*) USMAN *v.* RAHMET. **165 I.C. 329=9 R.L. 241=38 P.L.R. 500=A.I.R. 1936 Lah. 797.**

———*Public pathway—Right to use—Existence of dominant tenement—If necessary.*

A right of easement is claimable on the land of another by the owner of land. It is not a personal right but it attaches to land and is exercisable over another's land. A public pathway, however, may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is the owner of some land. In other words, the existence of a dominant tenement is not necessary. (*Jai Lal, J.*) USMAN *v.* RAHMET. **165 I.C. 329=9 R.L. 241=38 P.L.R. 500=A.I.R. 1936 Lah. 797.**

Quasi easement.

———*Quasi easements — Haveli — Right in—Nature of—Open courtyard common to buildings —Right of purchaser of plot to build and open windows doors.*

A haveli is not like property held jointly in co-ownership in the sense that all the rules and incidents of joint property are applicable to it, where any co-owner may alienate his rights therein, for such a power of alienation would immediately defeat the very object of maintaining a haveli. The law of easements as such cannot be applied to a haveli, for an easement predicates a dominant and a servient tenement vested in different persons. The rights of the owners over the haveli partake of the character of easements. They are quasi easements though not easements proper, the nature and extent of such rights being regulated by custom. Such rights can in law and in the nature of things only be attached to immovable property and can only be enjoyed by the owners of such property *qua* owners. There was a Shingrapota Brahmins' haveli, entirely enclosed by buildings built originally by the inter-related Shingrapota Brahmins, with the intention that the open space should serve as a common courtyard to which they should all have access and over which they should all have rights of enjoyment consistent with each other's convenience. To the north of the haveli was a plot which, though abutting on the haveli, had a building thereon which did not originally open on to the haveli. This building was brought by a non-Shingrapota Brahmin, who owned a building encircling the haveli. He, on the same site, built a new house, with doors and windows overlooking the haveli and a door on ground floor providing entrance from the haveli. The owners of the buildings enclosing the haveli brought a suit for a declaration that the non-Shingrapota Brahmin house owner could not open doors, etc., on the side of the haveli or build projections over it and for an injunction directing the defendant to close the doors, etc. The lower

Court dismissed the suit on the ground that the defendant as owner of the house which abutted on and opened on to the haveli, had a personal right of ownership in the haveli which he could exercise in respect of the new plot, which he had purchased and which abutted on the haveli.

Held, that the original owner of the plot having enjoyed no rights in the haveli *qua* the plot, could and did convey none to the defendant. By opening doors, etc., the defendant had materially affected its privacy and placed an additional burden on the restricted use of the haveli. Hence the plaintiffs were entitled to the relief asked for. (*Dadiba C. Mehta and Lobo, JJ.*) SALIGRAM *v.* BANSIRAM. **176 I.C. 966=11 R.S. 43=A.I.R. 1938 Sind 145.**

Right of privacy.

——*Right of privacy.*

It is the legal right of a person to open a door or an aperture in his own wall and that any person who suffers any discomfort or inconvenience thereby has equally a right to raise a wall or other obstruction on his own land against such door or aperture except, of course, where the right to open them has already been acquired as an easement. (*Ranjitmal, J.*) DEORAJ *v.* LADURAM, **1939 M.L.R. 150 (Civ.).**

——*Right of privacy—Acquisition of.*

There is no inherent right of privacy attaching to any property and this is specially so in a town. Such a right must be acquired either by usage or by grant. (*Jai Lal, J.*) HAFIZ ULLAH *v.* MOHD. HUSSAIN. **40 P.L.R. 483.**

Right of way.

——*Right of way—Long user—Presumption of legal origin for the right.*

Where a passage has been found to have been used openly, uninterruptedly and peaceably for about 50 years, it can be presumed that the right had a legal origin and that those using it had a right to use it. (*Thom, C.J. and Ganga Nath, J.*) RAM KALI *v.* MUNNA LAL. **I.L.R. (1939) All. 754=184 I.C. 620=12 R.A. 260=1939 A.L.J. 821=1939 A.W.R. (H.C.) 515=1939 R.D. 390=A.I.R. 1939 All. 586.**

——*Right of way—Public pathway—Dedication—Presumption from user—Length of time necessary.*

User from time immemorial may no doubt give rise to a presumption of a lost grant or public dedication of a right of way. But user short of that may also be the foundation of such a presumption. For the purpose of presuming dedication, there can be no hard and fast rule as to the length of time for which the user must be proved. Whether or not dedication may be presumed, really depends upon the facts and circumstances of each case. The mere fact that user has not been proved for a long series of years may not always be a conclusive reason for shutting out such a presumption. (*Biswas, J.*) JAMINI RANJAN *v.* PROMODE RANJAN. **44 C.W.N. 1029.**

——*Right of way—Right of way existing over one part of tenement for use of another part—Implied grant of such right on severance—Extent of right—Right to use it as* methor *passage.*

It is true that an owner can subject one part of his property by a quasi-easement in favour of another part and if afterwards he alienates a portion of his land, the purchaser takes the portion with all the convenience or quasi-easements which the proprietor has attached to it. But this applies only when the quasi-easements are continuous and apparent. There could be no implied grant where the easements are not continuous and non-apparent. A right of way is neither continuous, nor always an apparent easement, and hence would not ordinarily come under the above rule. Exception is no doubt made in certain cases where there is a "formed road" existing over one part of the tenement for the apparent use of another portion or there is "some permanence in the adaptation of the tenement" from which continuity may be inferred, but barring these exceptions an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement. Where, however, a deed of conveyance describes the property conveyed as bounded by a common passage, an implied grant of a right of passage may be presumed, and the extent of such right has got to be gathered from the language of the document, as well as from the surrounding circumstances of the case. Ordinarily such right of passage does not include the right to use it as a *methor* passage for the cleansing of a privy. (*Mukherjea, J.*) ANNAPURNA DUTTA *v.* SANTOSH KUMAR SETT. **I.L.R. (1937) 2 Cal. 727=176 I.C. 54=11 R.C. 33=69 C.L.J. 557=41 C.W.N. 1169=A.I.R. 1937 Cal. 661.**

Riparion owners.

——*Riparian owners--Rights of--Natural stream—Interception of flow of water by upper riparian owner—Stream and feeding tributaries flowing in well-defined channels—Right of lower owner to sue for mandatory injunction.*

A riparian owner is not entitled to impound the water flowing in defined and natural channels, but is entitled only to use it as it passes. The rights of a riparian owner are subject to the right of a lower riparian owner to have the water of the channels or streams flow in the customary manner down to him. Interference with such flow is an actionable wrong especially where the flow is totally cut off. A stream *P* taking its course in a jeroyati village of the zamin of the plaintiff, passed through the defendants' mukhasa village, and during its passage through the said villages, received tributary supplies from other streams which took their rise entirely within the defendants' village. The defendants intercepted the courses of some of these tributary streams and put up a long bund so as to form a tank, thereby cutting off the supply of water which was formerly flowing through these streams into the stream, *P*. It was found as a fact that the course of the stream was diverted towards the west and that the diversion caused damage to the plaintiff's lands. The tank and the stream *P* which supplied it belonged both to the plaintiff and the defendants and the water of the tributaries was flowing in well-defined channels, and these were natural streams.

Held, that the defendants were only riparian owners and that the fact that the rise of the tributaries and their course lay entirely within their lands did not improve their position, and the plaintiff was therefore entitled to have the water flowing in its accustomed course not only through the stream *P*, but also through the tributaries feeding it. The plaintiff's suit for injunc-

tion to compel the defendants to remove the obstruction to the courses of the natural streams and to close the portion of the channels newly directed towards the west and to restore it to its original condition, is therefore maintainable, though the interception was more than two years before suit. (*Burn, King and Venkataramana Rao, JJ.*) JAGANNADHARAJU *v.* RAJA OF VIZIANAGARAM. I.L.R. (1937) Mad. 510=168 I.C. 337 =1937 M.W.N. 59=45 L.W. 188=9 R.M. 568 =A.I.R. 1937 Mad. 310=(1937) 1 M.L.J. 216 (F.B.)

Suit—Parties.

——*Suit to establish—Parties—Dominant and servient tenements owned by several persons.*

To a suit by one of the owners of a dominant tenement to establish an easement right and for removal of an obstruction, the other owners of the dominant tenement are not necessary parties. If they do not feel aggrieved by the obstruction, it is not necessary that they must join with the plaintiff in the suit. As regards the servient owners, it is not necessary that all of them should be made parties. Where it is not suggested that any of them who have been left out was a party to the act of obstruction complained of or was in any way resisting the plaintiff's claim for easement, their absence is in no way fatal to the plaintiff's suit. (*Mukherjea, J.*) KEDARUDDIN AHAMED *v.* SAMSUR MATA. 10 R C. 54=169 I.C. 771=41 C.W.N. 769=A.I.R. 1937 Cal. 355.

Water rights.

——Water rights—Customary right and prescriptive right—Distinction. *See* WATER RIGHTS —IRRIGATION CHANNEL. 71 M.L.J. 268.

——Water rights—Customary right of ryotwari holder as against Government and private parties—Interference with right to supply of water for irrigation—Actionability—Proof of damage. *See* WATER RIGHTS — RYOTWARI HOLDERS. 43 L.W. 330.

——Water rights—Public stream—Irrigation channel—Prescriptive rights—If can be acquired by ryot as against Government. *See* WATER RIGHTS—PUBLIC STREAM. 71 M.L.J. 268.

——*Water rights—Public stream—Government putting up dam across public river and using water not for riparian tenement but for filling tank at a distance—Nature of right—Acquisition by prescription—Extent of right—Limit to enjoyment—Right of lower riparian owner to undiminished supply—Accumulation of silt over dam obstructing free flow of water—Suit by lower riparian owner—Limitation—"Continuing wrong."*

Where the Government as upper riparian owner seeks to use the waters of a public stream not for a riparian tenement, but for the purpose of filling a tank situate at a long distance, by putting up a permanent dam across the river, the right to divert water to such a tank in such manner is in the nature of easement and not a riparian right. The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. If the Government claims the easement by prescription, it is for the Government to show the extent of the prescriptive right. The burden is not on the lower riparian owner in an action

by him against the Government on the ground of excessive user, to prove that he has suffered damages as a result of any specific act of the Government. The suit cannot be regarded as one between two riparian proprietors. If it is proved that silt has accumulated over or near the dam in a way calculated to obstruct the natural flow of water over the dam, the plaintiff (lower riparian owner) is entitled to relief against the defendant (Government) unless the latter can show that the plaintiff's remedy is barred by limitation. The obstruction caused to the free flow of water in the river by such accumulation amounts to a "nuisance," and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and damages. The position is the same even when natural causes combine with the existence of the dam to bring about the obstruction. The fact that the Government has acquired a right by prescription to maintain the dam would not give the Government any immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. Nor can a plea of limitation be raised in respect of the removal of such obstruction. The injury caused to the lower riparian owner by such obstructions is in the nature of a "continuing wrong" within the meaning of S. 23, Limitation Act, and the lower riparian owner would have a cause of action accruing *de die in diem* until the opposing party acquires a prescriptive right to maintain the obstruction. It is also very doubtful whether a prescriptive right could be acquired at all in respect of a shifting or changing mass like silt accumulation. The acquisition by the Government of a prescriptive right to maintain the dam will not of itself entitle them to all the waters intercepted by the dam, but only to such water as they have been accustomed to take. If they are entitled to draw water through a channel with certain dimensions, they cannot enlarge the dimensions of that channel. (*Varadachariar and Mockett, JJ.*) SECRETARY OF STATE *v.* ZEMINDAR OF SAPTUR. 174 I. C. 229=10 R.M. 676=46 L.W. 862=1936 M.W. N. 948 (2)=A.I.R. 1938 Mad. 180.

——*Water rights—Ryotwari lands—Right of tenant—Customary mode of supply—Natural stream—Water diverted by ryots of village and used for wet cultivation on large scale over 30 years with the consent and approval of Government—Effect—Interference by ryots of another village—Actionability—Right to sue for injunction.*

A ryot in respect of ryotwari lands is entitled to receive from the Government a supply of water necessary and sufficient for the irrigation of his registered wet fields. The Government have got the right to regulate the method and manner of supply. But as an incident to the tenure there is a right in the ryot to receive the said water. Where the water of a natural stream which was until 1893 falling into Thangal and exclusively used by the ryots of a village, was diverted by them in 1893 into a tank and for over 30 years it has been the customary method to take the water of the stream to augment the supply of the tank without which it would be impossible to cultivate registered wet lands under the ayacut of the tank, the Govern-

ment must be taken to have impliedly recognised this as the customary method of supply for the time being for the irrigation of the wet fields. The fact that the stream is not shown as the source of irrigation in the settlement register cannot curtail the rights of the ryots. If with the consent and approval of Government water had been diverted from 1893, and Government chose to permit wet cultivation on a large extent knowing full well that without the aid of such water it would not be possible for the ryots to do so, the ryots must be deemed to have a right conferred on them by Government, a right to the said water, and any interference of such right by any one is actionable. The ryots can sue for a declaration of their rights and for an injunction restraining interference with such rights by the ryots of another village. (*Venkataramana Rao, J.*) ANNASWAMI NAICKEN *v.* MANICKA MUDALIAR. **176 I.C. 867=11 R M. 182=1937 M.W.N. 817=46 L.W. 472=A.I.R. 1937 Mad. 957.**

EASEMENTS ACT (V OF 1882), S. 1—*Applicability—Burma.*

Although the Easements Act does not apply to Burma, the Court must have regard to that Act while deciding a question relating to an easement. (*Mosely, J.*) TAN SIT SHAN *v.* U PO NYUN. **1940 Rang.L.R. 93=185 I.C. 605=12 R.R. 208=A.I.R. 1939 Rang. 421.**

——**Ss. 2 (b) and 4**—*Light for drainage—Easement or customary right.*

The customary right referred to in S. 2 (*b*) of the Easements Act must be one which is possessed irrespective of immovable property. The right for drainage, that is for the water, which is on or comes on to the land of a person to flow over certain other ground, is a right which is connected with the immovable property owned by him. Such a right, therefore, does not amount to a customary right, but amounts to an easement under S. 4 of the Easements Act. (*Sulaiman, C. J. and Bennet, J.*) ABDUL KARIM KHAN *v.* THE MANAGING COMMITTEE, GEORGE HIGH SCHOOL. **166 I.C. 211=9 R.A. 376=1937 All L.R. 1=1936 A.W.R. 1011=1936 A.L.J. 1160=A.I.R. 1936 All. 879.**

——**S. 4**—*Right of way—Easement with reference to one building—Same easement, if can be claimed with reference to another building at a different place.*

Where the easement of a right of way in respect of a stair case existed for the benefit of the dominant tenement, the upper storey of certain shops, and later on a right of way in respect of the same staircase but for the benefit of a different dominant tenement altogether, namely a mosque, built in a different place, is claimed, it was *held* that the owner of a right of way was not entitled to transfer the right in such a manner. (*Bennet and Verma, JJ.*) ANJUMAN ISLAMIA *v.* RADHAY LAL. **180 I.C. 621=11 R A. 486=1939 A.W.R. (H.C.) 141=1938 A.L.J. 1238=A.I.R. 1939 All. 194.**

——**S. 4**—*Right of way—Tenant of one land—If can acquire upon another land of his own.*

Although possession of the tenant is the possession of the landlord, still a tenant of one land cannot acquire either for himself, or on behalf of his landlord, a right of way, as of right, upon another land of his own. (*Mosely, J.*) TAN SIT SHAN *v.* U PO NYUN. **1940 Rang.L.R. 93=185 I.C. 605=12 R.R. 208=A.I.R. 1939 Rang. 421.**

——**S. 4, Expls. 12 and 15**—*Acquisition of easement—Right of way—Lessee of land for building purposes—If can acquire right of way over other land of lessor.*

A lessee of land who has taken it for building purposes cannot acquire a right of way by easement over other lands owned by his lessor. Such a lessee by reason of his being the owner of the materials of the house, would not become an owner within the meaning of S. 4 of the Easements Act, by virtue of Explanation that 'land' includes also things permanently attached to the earth. The lessee is not in the position of an owner of immovable property under S. 12 for the purpose of a right of way. Though he may be an owner of immovable property for purpose of acquiring easements under the first and second paragraphs of S. 15, when a case of right of way arises, he comes under the third paragraph of S. 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire for the benefit of the owner of the site. (*Bennet, Harries and Bajpai, JJ.*) ABDUL RASHID *v.* BRAHAM SARAN. **I.L.R. (1938) All. 538=175 I.C. 227=10 P.A. 653=1938 A.L.R. 383=1938 A.W.R. (H.C.) 319=1938 A. L.J. 436=A.I.R. 1938 All. 293 (F.B.).**

——**Ss. 4 and 15**—*Easement—Right to light and air—Acquisition as against occupier of land and not against owner—If contemplated.*

The Easements Act does not contemplate any acquisition of an easement against an occupier of land and not against an owner. An easement is acquired in the land and not against one or more of the persons interested in the land. Under S. 15 the right acquired by prescription is absolute; it is not possible to hold that such a right exists only against the occupier and not against the owner. The right which is absolute is a right in the land itself and an absolute right against all persons connected with the land whether as owners or as occupiers. Where an easement of light and air is claimed on the ground of 30 years' user over land held by a Railway Company, but it is found that the land is the property of the Government, the claim must fail and cannot succeed when there is no allegation or proof of 60 years' user; the plaintiff cannot claim on the basis of 30 years' user, a right as against the Railway Company as occupier as distinct from the Government as owner. (*Sulaiman, C. J. and Bennet, J.*) B. N. W. RAILWAY CO. *v.* MUNESHWAR RAM. **I.L.R. (1937) All. 511=1937 A.W. R. 215=1937 A.L.J. 249=169 I.C. 666=1937 A. L.R. 586=10 R.A. 67=A.I.R. 1937 All. 428.**

——**Ss. 4 and 15**—Pankh *or projection of roof—If easement—Acquisition.*

A *pankh* or projection of a roof of a house over the neighbouring land is an easement and not a trespass or occupation of property giving rise to any rights to the property covered by the projection by adverse possession. Such a right has to be acquired like any other easement by grant or prescription, and once it is acquired by prescription it becomes absolute under S. 15 of the Easements Act. (*Broomfield, J.*) SHAMBHUPRASAD *v.* LALBHAI. **163 I.C. 293=9 R.B. 1=38 Bom.L.R. 264=A.I.R. 1936 Bom. 219.**

——**S. 7, Ill. (i)**—*Right of drainage—Rights and obligations of owners of upper and lower lands—Principles.*

EASEMENTS ACT (1882), S. 7.

There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels. This principle is embodied in Ill. (*i*) to S. 7 of the Easements Act. But the right of the superior proprietor is not quite absolute. It would not for instance be within his right to introduce water which was foreign to the land. Further there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands. When land is so located that water naturally or in the course of ordinary agricultural operations descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. The upper proprietor may drain his land and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alteration in the mode of drainage cause the drainage water to flow his neighbour's land in an injurious manner. The upper owner further, is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there. The upper proprietor has no doubt the right to collect the water falling from the higher ground in one body in the course of draining the land. But that right is again not absolute. That can only be done without hurting the inferior tenement. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VENKATARAYA AYYAR *v.* SANKARAN EMBRANDI. **177 I.C. 425=11 R.M. 321=1938 M.W.N. 414=47 L.W. 564=A.I.R. 1938 Mad. 649=(1938) 2 M.L.J. 108.**

——**S. 7, Ill. (i)**—*Right to flow water from land on higher level—Right to obstruct.*

The right of every owner of upper land to flow water naturally falling on such land and not passing in defined channels, to the adjacent lower land, is a right *ex jure nature* and it comes under S. 7 (*b*) of the Easements Act. Until and unless anybody acquires any easement to restrict this right, it could not be interfered with. (*Ganga Nath, J.*) JAGANNATH *v.* ANGAD. **176 I.C. 107=11 R.A. 39=1938 A.L.R. 551=1938 A.L.J. 486=1938 A.W.R. (H.C) 307=A.I.R. 1938 All. 363.**

——**S. 7 (b), Ill. (j)**—*Natural lake or* maduga *belonging to Government bounded by Zamindari villages—Riparian rights—Right of Zamindar to use lake water for irrigation of lands abutting on the lake free of charge—Right of Government to levy water cess.*

The existence of riparian rights in respect of natural lakes is recognised in Ill. (*j*) to S. 7 (*b*) of the Easements Act and such rights therefore exist in respect of natural lakes no less than in respect of natural streams, and the same limits apply in both cases. Where a *maduga* or natural lake belonging to Government is bounded on all sides by Zamindari villages, the villages being included in the Zamindaris at the time of the Permanent Settlement, the riparian rights in respect of the lands abutting on the lake must be deemed to have passed along with the lands. Rights of a riparian owner in India include rights to take free of charge reasonable quantity of water for purposes of irrigation. When the lands abutting on the *maduga* or lake are irrigated by the water of the lake, the Government has no authority to levy irrigation cess from the Zamindar owning the lands. (*Pandurang Row, J.*) SECRETARY OF STATE *v.* SOMAYYA. **163 I.C. 87=8 R.M. 1085=1936 M.W.N. 417=43 L.W. 761=A.I.R. 1936 Mad. 550.**

EASEMENTS ACT (1882), S. 12.

——**S. 7 (b)**—*Right to let surface drainage water to neighbour's land—Easement in restriction of such right.*

Every landowner has a natural right to deal with his surface drainage water as he pleases; he can collect it and use it on his own land or he can let it find its way by gravitation to his neighbours land if that is at a lower level than his own land; but the owner of the lower land may acquire by prescription, as an easement restricting this natural right the right to throw water back to the land at a higher level. Hence where the owner of the lower land has acquired an easement to restrict the natural flow to such an extent as it may be restricted by a bund which has been in existence for over 25 years, the owner of the higher land cannot claim to breach the bund at a particular point to let out the water unless he has acquired such a right as an easement. *Wright* v. *Howard*, 24 R.R. 169; 1 Mad. 335 and 24 Cal. 865, Rel. on. (*Dunkley, J.*) U PO THET *v.* A. L. S. P. L. CHETTYAR FIRM. **14 Rang. 544=163 I.C. 453=9 R.R. 23=A.I.R. 1936 Rang. 282.**

——**S. 12**—*Acquisition of easement—Right of way—Enjoyment through tenant—Length of enjoyment—Computation—Period of tenancy, if to be excluded.*

Where a common third person is a tenant of both the plaintiff's and defendant's shops and the plaintiff through his shop claims a right of way over the land of the defendant, it is not open to the defendant to contend that the period during which the said third person was a tenant of the defendant and the plaintiff should be excluded from the period of 20 years during which the plaintiff claims to have enjoyed the right of way. (*Bennet and Verma, JJ.*) NASIR UDDIN HAIDER *v.* RAGHUBIR PRASAD. **182 I.C. 452=12 R.A. 22=1939 A.L.J. 68=1939 A.W.R. (H.C.) 129=A.I.R. 1939 All. 339.**

——**S. 12**—Easements—Who can acquire—Owner of immovable property—Claimant lessee of land for building purposes—If can acquire right of way. *See* EASEMENTS ACT, SS. 4, EXPL. 12 AND 15. **1938 A.L.J. 436 (F.B.).**

——**Ss. 12 and 15**—*Easements—Who can acquire—Right of way—User by visitors to dominant heritage—If can confer right on owner of dominant heritage.*

According to S. 12 of the Easements Act, it is the owner of the immovable property who alone can acquire an endorsement. A right of way or other easement mentioned in S. 15 of the Act must have been enjoyed in the manner laid down therein by the owner or occupier of the dominant heritage. As such the user of a particular pathway by the visitors to the dominant heritage could not confer a right of way in respect of it on the owner of the dominant heritage. (*Bennet and Verma, JJ.*) LALLU MAL *v.* AZIZ FATIMA. **179 I.C. 633=11 R.A. 373=1938 A.W.R. (H.C.) 795=1938 A.L.J. 1142=A.I.R. 1939 All. 90.**

——**Ss. 12 and 15**—*Lessee of land erecting house thereon—Acquisition of easements by—Benefit of—Right of owner of site.*

In the case of a lessee of a site, who is also the owner of the house which he has built thereon,

so far as the use of light or air or support for his building is concerned, he is an owner of the building and may, under the first two paragraphs of S. 15, Easements Act, acquire such easements, and he would not acquire them for any one except himself under S. 12, Easements Act. But when the question arises of a right of way or a right to flow of water he comes under paragraph 3 of S. 15 and anything which he would acquire, would be as the person in possession of the land which is his site, and he would acquire on behalf and for the benefit of the owner of the site. (*Lobo, J.*) ABDULLA HAROON *v.* MUNICIPAL CORPORATION, KARACHI. **179 I.C. 884=11 R.S. 157=A.I.R. 1939 Sind 39.**

——**S. 13**—*Easement of necessity—Mere inconvenience, if sufficient.*

It is not enough to show that in the absence of an easement there would be inconvenience felt, but it should be shown that there is an absolute necessity of the easement for the enjoyment of the property. (*Pandrang Row, J.*) MAHABOOB KHAN SAHIB *v.* GOVINDARAJULU NAIDU. **160 I.C. 955=8 R.M. 735=A.I.R. 1936 Mad. 142.**

——**S. 13**—*Easement of necessity—Right of way—Requisites to be proved.*

In order to claim a right of way as an easement of necessity, it must be shown that it is one without which the property retained upon a severance cannot be used at all. It is not enough, if it is shown that it is merely necessary to the reasonable enjoyment of the property. (*Dhavle, J.*) RAMANANDAN MARWARI *v.* RAMJIBAN MARWARI. **178 I.C. 803=5 B.R. 140=11 R.P. 296=A.I.R. 1939 Pat. 164.**

——**S. 13**—*Easement of necessity—What is.*

An easement of necessity is one without which the property retained upon the severance cannot be used at all; it is not one which is merely necessary to the reasonable enjoyment of that property. (*Niyogi, J.*) RAJLU NAIDU *v.* MALAK. **I.L.R. (1939) Nag. 580=186 I.C. 155=12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.**

——**S. 13**—*Person building on extreme limit of his land—Right to go on neighbour's courtyard to carry on building operations.*

A person who builds on the extreme limit of the boundaries of his land has no legal right to compel his neighbour to allow him or his workmen to pass through his courtyard or to carry on building operations from there without his permission, unless he has acquired an easement by 20 years' uninterrupted user. No easement of necessity could possibly be acquired by him, if the two tenements were never owned by one person. (*Tek Chand, J.*) ASMAT ULLAH *v.* RAHMAT ULLAH. **171 I.C. 40=10 R.L. 157 (1)=39 P.L.R. 66=A.I R. 1937 Lah. 320.**

——**Ss. 13, 24, 25 and 27**—*Scope—Right of support to building—Nature of—If natural right—First floor and ground floor of same building belonging to different owner—Right of owner of first floor to support from ground floor—Right to enter upon ground floor—Liability of owner of ground floor—Extent of.*

A house was originally partitioned between two brothers, one of whom got the ground floor and the other the first floor. Subsequently the ground floor became vested in the defendant and the first floor in the plaintiff. The plaintiff claimed that as owner of the first floor he was entitled to the right of support from the ground floor and other attendant rights.

Held, that the plaintiff was entitled to support to his first floor from the ground floor of the defendant, but that the defendant was not liable to keep the ground floor in repair in order to make this right of support effective but that the plaintiff could enter upon the ground floor for the purpose himself of doing the necessary repairs and the Court would grant an injunction to protect those rights. This right of support is an easement and not a natural right. There cannot be a natural right of support for something which itself has no natural existence. (*Beaumont, C.J. and Rangnekar, J.*) FIDAALLI MULLA *v.* AKBARALLI KADARBHAI. **I.L.R. (1939) Bom. 375=182 I.C. 731=12 R.B. 36=41 Bom. L.R. 387=A.I.R. 1939 Bom. 210.**

——**S. 13 (a)**—*Easement of necessity—Right of way—Conditions of.*

The easement contemplated by S. 13 (*a*), Easements Act, must be absolutely necessary for the enjoyment of the subject of transfer or bequest. Where a plaintiff claims a right of way over a stair case as an easement of necessity and it is found that the plaintiff can have another access to the upper storey of his house by constructing one or more stair-cases, the easement not being absolutely necessary for the enjoyment of the property cannot be granted as a necessary easement. (*Gruer, J.*) AHMAD ALI FAKRUDDIN *v.* DHONDBA DASRATH. **I.L.R. (1937) Nag. 204=171 I.C. 496=10 R.N. 114=A.I.R. 1937 Nag. 179.**

——**S. 13 (a)**—*Transferee of plots for building purposes—Right of lateral support for the building against adjacent plots.*

On a severance of tenements, the transferee of plots sold for building purposes acquires as an easement under the provisions of S. 13 (*a*) of the Easements Act the right of lateral support for the building which is intended to be constructed on the plots sold, against the adjoining plots of the severed property. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) SRI NATH *v.* KEDAR NATH PURI. **164 I.C. 1025=9 R.O. 122=1936 O.W.N. 865=1936 O.L.R. 540=A.I.R. 1937 Oudh 57.**

——**S. 13 (c)**—*Easement of necessity—When can be granted.*

An easement of necessity is not to be granted merely on the ground of convenience or advantage, but solely on the ground of absolute necessity. (*Nanavutty and Zia-ul-Hasan, JJ.*) ZAKIA BEGUM *v.* THE LUCKNOW IMPROVEMENT TRUST. **13 Luck. 192=167 I.C. 414=9 R.O. 382=1937 O.W.N. 252=1937 O.L.R. 115=A.I.R. 1937 Oudh 263.**

——**S. 13 (e)**—*Applicability—Test—Partition of land into two contiguous plots A and B—Before partition owner of A using passage over B to join public road—Another passage existing—Claim to easement of necessity—Maintainability.*

Under S. 13 (*e*) there is no question of what was the practice at the time of partition, but what were the necessities of the case at the time of partition. So where a piece of land is partitioned into two contiguous plots *A* and *B* and before partition owner of *A* was using *B* land to pass over to a public road, but there was also another passage for the owner of *A* to do so without passing over *B* land, the owner of *A* cannot claim an easement of necessity

against *B* under S. 13 (*e*). (*Stone, C.J. and Niyogi, J.*) NAWNITDAS LALDASS *v.* NARSIDAS. I.L.R. (1937) Nag. 32=165 I.C. 81=9 R.N. 58= A.I.R. 1936 Nag. 182.

——S. 15—*Acquisition of right*—Mokarrari *leaseholder—If can acquire easement against another such leaseholder holding under same landlord.*

A mokarrari leaseholder cannot acquire a right of easement by virtue of prescription over the land of another mokarrari leaseholder holding under the same landlord. (*Edgley, J.*) ABDUL HAQUE *v.* TARABANNESSA. I.L.R. (1937) 1 Cal. 569=172 I.C. 320=10 R.C. 366=A.I.R. 1937 Cal. 572.

——S. 15—*Applicability — Conditions—Period of enjoyment by predecessor in interest—If can be tacked on to that of successor-in-interest.*

It is open to the Courts to recognise acquisition of the easement by the claimant if he could prove continuous enjoyment for the requisite period by himself or his immediate predecessor in occupation of the property. (*Niyogi, J.*) NAGO *v.* MT. LAHANI. 168 I.C. 921=9 R.N. 277=A.I. R. 1937 Nag. 38.

——S. 15—*"As of right"—Meaning of—English Law.*

There is no reason why the expression "as of right" which appears both in S. 26, Limitation Act, and S. 15, Easements Act, should not receive the same interpretation as in English Law. (*Rupchand Bilaram and Mehta, A.J.Cs.*) MOWLOO NANJI *v.* ROCHIRAM. 30 S.L.R. 32=163 I.C. 137 =8 R.S. 180=A.I.R. 1936 Sind 61.

——S. 15—*Applicability—Requirements to be fulfilled—Onus.*

Under S. 15 of the Easements Act there are two requirements to be fulfilled: first the enjoyment must be up to within two years of the date of suit and secondly that up to that time it must have been enjoyed for 20 years and without interruption. The period of enjoyment up to within two years of the suit need not be a period of actual user up to the last moment, provided the absence of user does not amount to absence of enjoyment; whether it does or not is a question which depends on the facts of each case. The onus is on the person claiming the easement to prove the user. If there is not merely non-user but actual abandonment, then the person claiming the easement cannot succeed. (*Hamilton, J.*) GAJRAJ SINGH *v.* RAM SAHAI SINGH. 15 Luck. 509=186 I.C. 830=12 R.O. 349=1940 A.W.R. (C.C.) 130=1940 O.L.R. 164=1940 O A. 251= 1940 O.W.N. 267=A.I.R. 1940 Oudh 197.

——S. 15—*Construction — "Any other easement"—Right to throw filthy water on to neighbour's land—Acquisition—Exercise of right for less than statutory period—Right of injured party to sue for injunction—Delay in suing—If bar to injunction—Nuisance—Remedy.*

The right of throwing filthy water on to a neighbour's land is an easement which can be acquired either by express grant or under S. 15 of the Easements Act by prescription; the words "any other easement" in the section are comprehensive enough to include such a right. Where such right has not been acquired, *e.g.*, where the right has not been exercised for the requisite statutory period, the act of polluting amounts to a nuisance which is actionable. The injured party

has his remedy and can sue for an injunction without taking steps to abate the nuisance. The mere fact that there has been delay in suing will not disentitle him to an injunction, where the situation of the parties has in no substantial way been altered either by delay or by anything done in the interval. (*Venkatasubba Rao, J.*) RAMASUBBIER *v* MAHOMED KHAN SAHIB 173 I.C. 705= 10 R.M. 630=46 L.W. 466=1937 M.W.N. 690= A.I.R. 1937 Mad. 823=(1937) 2 M.L.J. 350.

——S. 15—*Joint party wall—Windows or apertures in—Easement of light and air—If can be acquired by prescription.*

An easement of light and air through apertures or windows in a wall cannot be acquired by prescription, when the wall in question is a joint wall belonging to both the parties, because it is the essence of an easement that it should be a right over property not belonging to the claimant but to some one else. (*Barlee and Macklin, JJ*) NARAYAN BALVANT *v.* SHANKAR. I.L.R. (1938) Bom. 53=174 I C. 944=10 R.B. 510=40 Bom. L.R. 115=A.I.R. 1938 Bom. 215.

——S. 15—*Periods of enjoyment—Successive trespassers—If can be tacked on.*

The principle that one trespasser cannot tack on to his own possession, the possession of another trespasser is sound but cannot apply to the acquisition of a right of easement which must be distinguished from the ownership. These rights cannot co-exist as they are mutually exclusive. The adverse possession spoken of in connexion with acquisition of ownership means total exclusion of the rightful owner; whereas the enjoyment and user necessary for the acquisition of easement is consistent with the possession as well as the enjoyment by the rightful owner. The adverse possession in reality extinguishes the title of the rightful owner, but the enjoyment by a person claiming the right of easement does not in the least affect either the possession or the title of the owner. The easement only restricts the owner's rights in some ways in regard to the enjoyment of his tenement. Moreover the right of easement is annexed to the land or tenement and cannot be acquired in gross as a personal right. (*Niyogi, J.*) NAGO *v.* MT. LAHANI. 168 I.C. 921=9 R.N. 277=A. .R. 1937 Nag. 38.

——S. 15—*Right of easement—Conditions of—"As of right"—Presumption from user for statutory period—Nature and effect of—Rebuttal—Onus—Facts to be proved.*

In order to establish a right of easement under S. 15 of the Easements Act, a plaintiff has to establish user for the statutory period. He has to establish that the user is as of right, but the law presumes that it is as of right, that is to say, that it has a lawful origin, if the plaintiff proves open and notorious user. That presumption is, however, rebuttable, and the defendant may show that if he can, that the facts are such that the user was not as of right, *e.g.*, he can show that the user was under license not amounting to a grant, or he can show fraud in the sense it is used in relation to this subject, or he can show force, or he can show secrecy. Those would show that it was not as of right. (*Gilbert Stone, C.J.*) NATHURAM *v* KALU. I.L.R. (1938) Nag. 21=20 N.L J. 12=171 I.C. 121=10 R.N. 93=A.I R. 1939 Nag. 69.

——S. 15—*Right of way—Acquisition—Tenant holding temporary lease—User of land in possession of other tenant under same landlord—If "as of right"—Effect.*

Where two persons hold adjoining plots of land under a temporary lease issued by the Government which is terminable at three months' notice and is transferable only with the sanction of the Government, one of them cannot acquire a right of way by user over the land which he is in possession of the other as he cannot be said to have enjoyed the alleged easement as of right. 15 Beng.L.R. 361; 14 All. 185; 16 All. 181; 29 Cal. 363; 19 C.W.N. 121; 49 I C. 798; A.I.R. 1929 Pat. 124; *Wheaton* v. *Maple & Co.*, (1893) 3 Ch. 48 and *Kilgour* v. *Gaddes*, (1904) 1 K.B. 457, Ref. (*Rupchand Bilaram and Mehta, A.J.Cs.*) MOWLOO NANJI *v.* KOCHIRAM. **30 S.L R. 32=163 I.C. 137 =8 R.S. 180=A.I.R. 1936 Sind 61.**

——S. 15—*Right of way—Constructive enjoyment—If can be presumed—Servitude acquired for one purpose—If can be used for another.*

The presumption of constructive enjoyment can no more be made in favour of a person acquiring easement by prescription than the presumption of constructive possession made in favour of a trespasser acquiring prescriptive title. If there is a grant, it is construed against the grantor but in case of prescriptive right, its extent must be measured and determined by the accustomed user. It is on this principle that a servitude acquired for one purpose cannot lawfully be used for another. Hence where a person has by prescription acquired a right of way on other's land for himself, his servants and carts, the right of way cannot be presumed to include the passage for sweepers. Nor can such a presumption be based on the circumstances that the houses occupied by the parties had at one time belonged to a common owner unless the way was necessary for enjoying the tenement which was purchased by the person claiming easement. Morever, right of way is not a continuous and apparent easement. The case therefore cannot fall within the terms of S. 13 (*f*), Easements Act. Nor can it be presumed that the way is for all purposes on the ground of its being a common way because it is only when the land that is used for passage is found to belong to both the neighbours that the way might be presumed to be used for all purposes. (*Niyogi, J.*) RAJLU NAIDU *v.* MALIK. **I.L.R. (1939) Nag. 580=186 I.C. 155= 12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.**

——S. 15—Right of way—Lessee of land for building purposes—If can acquire. *See* EASEMENTS ACT, Ss. 4, EXPLS. 12 AND 15. **1938 A.L J. 436 (F B.).**

——S. 15—*Right of way—Long user—Presumption.*

It is no doubt incumbent on the person claiming easement to establish that his user was as of right but the law presumes that it is as of right, that is to say it has a lawful origin, if he proves open and notorious user. On proof of the fact of enjoyment from time immemorial there must arise a presumption of a legal origin for the right claimed. Hence where a person had been exercising his right of way for himself, for his servants and for his carts from remote past as appurtenant to his shop and relations between the

parties were not such as to indicate that the user was attributable to leave or license, it must be presumed that his user was as of right. (*Niyogi, J.*) RAJLU NAIDU *v.* MALAK. **I.L.R. (1939) Nag. 580=186 I.C. 155=12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.**

——Ss. 15, 24 and 27—*Right of way—Meaning of—Blind lane—Right to enter upon for certain number of days in a year for repairing dominant owner's wall—Nature of—If accessory easement —Miscellaneous easement—Extent of.*

A right of way ordinarily entails a point of arrival and a point of departure, both of which must be fixed. A blind lane which is blocked up by a wall on one side, cannot be subject to a right of way. Where a person claims neither a right to pass along a lane nor a right to carry materials over it, but a right to remain on it for hours at a time for a certain number of days in a year and to dump materials there and keep them there in order to repair his own wall, the right claimed is not a right of way as ordinarily understood. Nor can it be called an accessory easement, as the right is claimed by the party to repair his own wall standing on his own land. The easement is what is called a miscellaneous easement, and all that the party can claim is a right to enjoy what he has prescribed for in a reasonable way. The Courts have always barred against an unreasonable restriction on the servient owner's enjoyment of his own property. (*Bose, J.*) PANDU *v.* LAXMAN. **I.L.R. (1937) Nag. 21=176 I.C. 415=11 R.N. 50=A.I.R. 1937 Nag. 322.**

——S. 15—Right of way—User by visitors to dominant heritage—If can confer right on owner of dominant heritage. *See* EASEMENTS ACT, Ss. 12 AND 15. **1938 A.W.R. (H.C.) 795=1938 A.L. J. 1142.**

——S. 15—*Right to acquire easement—Dominant owner also part owner of servient tenement.*

A dominant owner who is also a part owner of the servient tenement cannot acquire an easement over that tenement. In order to acquire an easement by prescription, it is necessary that the right must be enjoyed in the character of an easement, and if a dominant owner is a part owner of the servient tenement, he would enjoy as of "right", not the easement but the soil itself. (*Mukherji, J.*) KEDARUDDIN AHAMED *v.* SAMSUR MATA. **10 R.C. 54=169 I.C. 771=41 C.W.N. 769=A.I.R. 1937 Cal 355.**

——S. 15—*Scope—Title by lost grant—Claim to apart from Act.*

There is nothing to prevent a claim to title by lost grant being made under the Indian law apart from S. 15 of the Easements act. The Act is remedial and is neither prohibitory nor exhaustive. (*Venkataramana Rao, J.*) NAGARATHNA MUDALIAR *v.* SAMI PILLAI. **59 Mad. 979=9 R.M. 178=164 I C. 764=44 L W. 139=1936 M.W.N. 426=A I.R. 1936 Mad. 682=71 M.L J. 187.**

——S. 15—*Water rights—Tenants using water for second crop from landlords tank for over 20 years without interruption—Landlord not proving permission and not collecting cess or compensation—Use—If as of right—Presumption—Indefiniteness as to quantity of water available in particular years—If makes it precarious—Prescriptive right—If acquired.*

Where the tenants of a zamindar have been using water from his tank for raising a second

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crop on their *manyam* lands for over 20 years openly and continuously and without interruption, their right to take water for a first crop being admitted by the zamindar, and it is found that at no time for considerably over 20 years has the zamindar claimed or recovered compensation for the water taken by the tenants for the second crop, a presumption arises in favour of the tenants that they have been using the water as of right; and when no attempt is made to show that they were doing so with the permission of the zamindar or to prove any facts to negative the claim as of right, it must be held that the tenants have acquired a prescriptive right to get an amount of water sufficient to irrigate their lands without any liability to pay for it. The fact that in some years there may not have been enough water to irrigate as large an area as in other years and that in some years there may have been an amount sufficient to irrigate a larger area than in other years will not make the right incapable of being prescribed for as being of a precarious nature. (*Beasley, J.*) MAHARAJAH OF VENKATAGIRI *v.* ARDHAMALA YAGADU. 175 I.C. 568=10 R.M. 795 =1937 M.W.N. 895=46 L.W. 643=A.I.R. 1937 Mad. 953.

———S. 15, Expl. II—*User by father of plaintiff's vendor for less than the statutory period—Son, not using for 6 years after father's death—Plaintiff's user after purchase not extending to the statutory period—Interruption—Right of easement, if acquired.*

Where the plaintiff's father's vendor had used a particular courtyard for the purposes of his business, for a period of about 12 to 15 years and after his death his son had closed down the business and did not use the courtyard for a period of nearly 6 years for his business, and the plaintiff after purchase from the son had used it for a similar business of his own for a period of about 12 years, it could not be said that the plaintiff had acquired a right of easement for there had been an interruption and an intention to cease to enjoy the right. (*Bennet, A. C. J. and Verma, J.*) FAIZULLAH EBADULLAH *v.* BADRUZZAMAN. I.L.R. (1938) All. 840=11 R.A. 284=178 I.C. 25= 1938 A.L.R. 838=1938 A.W.R. (H.C.) 568= 1938 A.L.J. 867=A.I.R. 1938 All. 587.

———S. 17 (c)—*Construction—"And"—Meaning of—If means "or".*

For the purposes of S. 17 (*c*) of Easements Act, what is required is that the surface water shall not simply be water flowing on the surface, it must be gathered up in some way either in a defined channel or by being collected in some other way. The word "and" in the clause must be construed as "or". The qualities are not conjective. (*Stone, C. J.*) KALANATH *v.* WAMAN RAO. I.L.R. (1937) Nag. 13=174 I.C. 267=10 R.N. 368=A.I.R. 1937 Nag. 310.

———S. 18—*Applicability—Right to make offerings at a particular place—Owners of cattle of a village accustomed to so offer for long time past.*

Where the plaintiffs as owners of cattle living in a particular village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular 'Isthan' in a room, it does constitute a right of the plaintiffs to continue to make those offerings. (*Bennet and Verma, JJ.*) KANHAI SINGH *v.* BASDEO SHAHAI.

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1939 A.W.R. (H.C.) 327=1939 A.L.J. 391=185 I.C. 334=12 R.A. 312 (2)=A.I.R. 1939 All. 387.

———S. 18—*Customary easement—Requisites.*

To establish a customary easement, the custom must be reasonable, certain, and the user must not have been permissive or exercised by stealth or force and the right should have been enjoyed for such a length of time as to suggest that by agreement or otherwise the user had become the customary law of the locality. (*Stone, C. J. and Bose, J.*) GANPATRAO *v.* SHEIKH BADAR. 1939 N.L.J. 246=183 I.C. 341=12 R.N. 56=A.I.R. 1939 Nag. 193.

———Ss. 22 and 23—*Right to open new windows in building overlooking neighbour's land—Right to open new outlets for discharging drain water on to neighbour's land—Limits to—Injunction—Right of servient owner to claim.*

Every man may open any number of windows in his house looking over his neighbour's land. This right is a continuing one and a man can open new windows from time to time, provided no additional burden is imposed on the servient tenement. Even if the owner of the servient tenement has a technical grievance Courts have a discretion to refuse an injunction. In the way a man has a right to open new outlets for drains and new spouts for leading rain water from the terrace of his building to his neighbour's land the Court will not grant an injunction, when it is found that no additional burden is caused to the land of the servient owner. What amounts to an additional burden is a question of fact to be determined in each case from the nature of the right and the circumstances of the case. (*Gruer, J.*) SAKHARAM *v.* SAKHARAM. 20 N.L.J. 99.

———S. 24—Accessory easement—Right to enter on another's land in order to repair one's own wall standing on own land—Nature and extent of. *See* EASEMENTS ACT, SS. 15, 24 AND 27. I.L.R. (1937) Nag. 21.

———S. 27—Miscellaneous easement—Right to enter on another's land for certain number of days in the year in order to repair one's wall—Nature and extent of—Restrictions on servient owner's use of his land—Right of dominant owner to impose. *See* EASEMENTS ACT, SS. 15, 24 AND 27. I.L.R. (1937) Nag. 21.

———S. 29—Prescriptive right to maintain dam across river for purpose of taking water to tank through channel—Right to enlarge dimensions of channel or to take increased quantity of water. *See* EASEMENT—WATER RIGHTS. 46 L.W. 862.

———S. 33—*Construction and scope—Light and air—Obstruction to—Blocking up of window not causing actual damage—Suit for injunction—Cause of action—Relief—Award of damages.*

Under S. 33 of the Easements Act, any act of the defendant which affects the evidence of easement is enough to sustain an action by the plaintiff, though the plaintiff does not suffer actual damage. In other words there is a wrongful act for which an action lies. In a suit by the plaintiff for an injunction in respect of alleged obstruction to light and air, it was found that there were three windows in the plaintiff's wall which were in existence for over the statutory period and that obstruction was caused to one of them by the defendants raising a wall; but it was also found that the plaintiff was receiving sufficient light and air from other sources.

Held, that the closing up of one of the windows of the plaintiff did constitute an invasion of the plaintiff's easement though it did not cause actual damage to the plaintiff and therefore the plaintiff had a cause of action against the defendant. [Having regard to the facts of the case a sum of Rs. 150 was awarded to the plaintiff as damages.] (*Somayya, J.*) SOFIA BI BI *v.* VASUDEVA CHETTY. **1940 M.W.N. 914=52 L.W. 383=(1940) 2 M.L. J. 381.**

——**Ss. 33 and 35**—*Easement of light and air—Interference—Right to injunction.*

Ss. 33 and 35 of the Easements Act make it clear that a plaintiff is not entitled to an injunction in every case of an interference with an easement of light and air. An injunction cannot be granted in the case of an actual interference unless there is an actionable interference with the easement. Under Expls. 2 and 3 of S. 33, no interference with the free passage of light and air is actionable unless such interference is of a substantial character. (*Harries, J.*) WALI MOHAMMED *v.* BATUK. **163 I.C. 843=9 R.A. 82=1936 A.L.J. 712=1936 A.W.R. 525=1936 All.L.R. 674=A.I.R. 1936 All. 517.**

——**Ss. 33 and 35**—*Interference with light—Light coming from other sources—If can be taken into account.*

In cases of dispute about interference of light, light acquired by grant or prescription, and not light which has not yet been acquired by prescription but was only in process of being so acquired can be taken into account. Light coming in sufficient amount from sources other than those in dispute should be taken into account. (*Addison and Abdul Rashid, JJ.*) MAHOMED ZAMAN KHAN *v.* MALIK UMAR HAYAT KHAN. **17 Lah. 599=165 I.C. 291=9 R.L. 239=38 P.L.R. 1003=A.I.R. 1936 Lah. 792.**

——**S. 35.** *See* EASEMENTS ACT, SS. 33 AND 35. *supra.*

——**S. 35**—*Scope—Easement—Invasion of right—Mandatory injunction—Right to.*

A mandatory injunction should not be granted if the invasion of the right of easement is such that pecuniary compensation would afford adequate relief. Plaintiff must prove substantial damage within the meaning of S. 33, Easements Act. The house of the plaintiff was a large one, and a room lighted by the window which was blocked by the construction of a wall by the defendant was only one small room in this house. The plaintiff did not show for what purpose he ordinarily used this room, and there was no ground for holding that the value of the house had been diminished by the blocking up of this window.

Held, that pecuniary compensation would afford him adequate relief for any damage that had sustained, even though the defendant acted high-handedly in building wall which obstructed it. (*Pollock, J.*) GAJADHAR PRASAD *v.* BHAGOLA. **165 I.C. 94=9 R.N. 57=A.I.R. 1936 Nag. 274.**

——**S. 43**—Replacing of windows—Increasing of burden. *See* SPECIFIC RELIEF ACT, S. 55. **A.I.R. 1937 Lah. 839.**

——**S. 52**—*Permission given to local body to occupy land to use it for purposes of school—If amounts to licence.*

Certain property was given by a person to a local body for the purposes of a school. The body

was allowed to hold possession of the land so long as it was being used for the purpose of the school. There was however no transfer of ownership nor was there any evidence showing transfer of ownership, and there was also no relationship of landlord and tenant between the parties.

Held, that the permission granted to the local body to hold the land and use it for the purposes of the school was in the nature of a licence. (*Bhide, J.*) JAGAT SINGH *v.* DISTRICT BOARD, AMRITSAR. **186 I.C. 890=12 R.L. 434=A.I.R. 1940 Lah. 18.**

——**Ss. 59 and 60**—*Licensee building on land—Transferee in licensor—Power to revoke license.*

If a licensee, acting upon the license has built a structure on the land, it would not be open to the transferee of the licensor to revoke the license. (*Mahomed Ismail, J.*) MAHOMED HASAN *v.* BODDHU **172 I.C. 973=10 R.A. 445=1938 A.L.R. 60=1937 A.W.R. 1085=1937 A.L.J. 1297=A.I.R. 1938 All. 32.**

——**S. 60**—*Applicability — Addition made by grantee to rooms and land given for residence.*

Where certain persons were permitted only to reside in the rooms, any additions made by them would not be governed by the grant and hence S. 63 of the Easements Act will not come into operation. (*Ismail, J.*) KARAN SINGH *v.* BUDH SEN. **176 I.C. 135=11 R.A. 43=1938 A.L.R. 572=1938 A.L.J. 465=1938 A.W.R. (H.C.) 280=A.I.R. 1938 All. 342.**

——**S. 60**—*Licence—Revocation— Absence of acting on the licence—Equity—Inference of contract to grant perpetual licence—Conduct of parties.*

S. 60 (*b*) of the Easements Act cannot be availed of by the licensee when there has been no acting on the licence in the execution of works by him; but if the licensee establishes that the conduct of the licensor has been such as to justify the legal inference that he had by plain implication contracted that the license would be perpetual, he can rely on the equitable doctrine and call upon the Court to intervene for his protection. The contract sought to be inferred does not mean that the real consensus of mind between the two parties must be inferred to have existed, but that the conduct of the parties has been such that equity will presume the existence of such a contract as a matter of plain implication. The onus of establishing such equity is on the licensee. (*Lord Maugham.*) GUJRAT GINNING AND MANUFACTURING CO., LTD, AHMEDABAD *v.* MOTI LAL HIRABHAI SPINNING AND MANUFACTURING CO., LTD. **63 I.A. 140=63 C.L.J. 160=40 C.W.N. 417=1936 A.L.J. 145=1936 A.W.R. 169=160 I.C. 837=1936 R.D. 63=43 L.W. 289=38 Bom.L.R. 353=8 R.P.C. 169=1936 O.L.R. 133=1936 All.L.R. 237=1936 M.W.N. 314=A.I.R. 1936 P.C. 77=70 M.L.J. 190 (P.C.).**

——**S. 60**—*Licensee erecting works of permanent nature—Grantor's right to recover land on payment of compensation.*

Where a person who has given his land to the licensee for certain purpose has given him an undertaking that he would not claim the land so long as it was required for that purpose and on acting on that promise the licensee has erected works of permanent nature, the grantor of licensee is not entitled to recover land even on payment of compensation because S. 60 does not

recognize any such exception. (*Bhide, J.*) JAGAT SINGH *v.* DISTRICT BOARD, AMRITSAR. 186 I.C. 890 =12 R L. 434=A.I.R. 1940 Lah. 18.

——S. 60—*Works of permanent character—Sinking well and erecting compound wall.*

Sinking a well and erecting compound wall can be considered to be works of a permanent character within the meaning of S. 60. (*Bhide, J.*) JAGAT SINGH *v.* DISTRICT BOARD, AMRITSAR. 186 I.C. 890=12 R.L. 434=A.I.R. 1940 Lah. 18.

——S. 60 (b)—*Construction—"Acting upon the license"—Meaning of.*

The words "acting upon the licence" in S. 60 (*b*) of the Easements Act must mean acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not "act upon a license" if he does work and incurs expenses upon his own property. Works done by the licensee on his own land may be done without the knowledge of the licensor, and it is impossible to hold that the alleged licensor's land is bound in perpetuity (subject to S. 62) as the result of some works done by the alleged licensee on his own property, of which the former has been unaware. S. 60 is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee rights against him. (*Lord Maugham*) GUJRAT GINNING AND MANUFACTURING CO. LTD., AHMEDABAD *v.* MOTI LAL HIRABHAI SPINNING AND MANUFACTURING CO., LTD. 63 I.A. 140=63 C.L.J. 160=40 C.W.N. 417=1936 A.L.J. 145=1936 A.W.R. 169 =160 I.C. 837=1936 R.D 63=43 L.W 289=38 Bom.L.R. 353=8 R P C. 169=1936 O L.R. 133 =1936 All.L.R. 237=1936 M.W.N 314=A.I.R. 1936 P.C. 77=70 M.L.J. 190 (P.C.).

——S. 62 (f)—Land given to *riyaya* for residential purposes—Execution by him of wakf-deed in respect of that land—Effect of. *See* LANDLORD AND TENANT—ABANDONMENT. 185 I.C. 467.

——S. 62 (h)—Applicability—Abadi sites. *See* CENTRAL PROVINCES LAND REVENUE ACT, S 71. A.I.R. 1937 Nag. 338.

EASTERN BENGAL AND ASSAM GENERAL CLAUSES ACT, S. 14—Applicability—Municipal election—Rule requiring 15 days' interval between nomination and election—Election fixed for 30th April—Office closed from 30th March to 4th April—Nomination reaching on 5th April — If sufficient compliance — Validity of nomination. *See* ASSAM MUNICIPAL ACT—ELECTION RULES. 40 C.W.N. 553.

EAST INDIAN RAILWAY COMPANY PURCHASE ACT (1879), S. 3—*Contract between Secretary of State and East Indian Railway—Debt or liability incurred with the sanction of the Secretary of State—Meaning of—Dismissal by Railway of employee—Damages for—Liability of Secretary of State—Breach of contract to employ—Liability for damages*

The Secretary of State did not, under S. 3 of the East Indian Railway Company Purchase Act of 1879, undertake directly any liability incurred by the Railway Company to third parties, but only to indemnify the Railway against certain debts and liabilities. A claim for damages for breach of contract, such as wrongful dismissal

from service, cannot be described as a debt or liability incurred with the sanction of the Secretary of State. The latter cannot, therefore, be made answerable for damages occasioned by wrongful dismissal of a servant on the part of the East Indian Railway Company. Nor can the Secretary of State be made liable for breach of contract to employ a servant. There is no distinction between those servants who are employed to carry out sovereign functions and those who are employed to carry out trading functions. The Secretary of State has power to dismiss all servants at pleasure. (*Panckridge, J.*) M. D'CRUZ *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. 40 C.W.N. 865.

——S. 4—*Railway Provident Fund—Liability of Secretary of State to members—R. 26, effect of.*

Although the effect of S. 4 of the Act is to give members of the Railway Provident Fund a direct claim against the Secretary of State, where no such reference to the Advocate General or standing Counsel as is contemplated by R. 26 of the Provident Fund Rules has been in fact made, there is no cause of action in respect of the Provident Fund. (*Panckridge, J.*) M. D'CRUZ *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. 40 C.W.N 865.

EJECTMENT. *See also* LANDLORD AND TENANT—TRESPASSER.

——Bar—Defendant claiming land as his exclusive property and as having been in exclusive possession of himself and ancestors—Adverse finding—Entry in later record-of-rights showing defendant as occupancy raiyat in cultivating possession—Non-rebuttal of—Effect—If bar to ejectment of defendant. *See* PRACTICE—INCONSISTENT PLEAS. 17 Pat.L.T 797.

——Notice to quit—Necessity. *See* LANDLORD AND TENANT—PERMANENT TENANCY. A.I.R. 1937 Pat. 391.

——Suit for—Absence of notice to quit—Declaration of notice to quit—Declaration of plaintiff's title and right to possession—If can be granted. *See* PRACTICE—RELIEF. 18 Pat.L.T. 518.

——*Suit for—Doctrine of* Walsh *v.* Lonsdale—*Applicability—Contract with minor.*

The doctrine of *Walsh* v. *Lonsdale* is based upon the principle that equity regards all that as done which ought to have been done, and if the defendant in an action of ejectment had an enforceable right to enforce specific performance of a contract entered into, entitling him to remain in occupation of the land, it would furnish a complete defence to the action commenced by the plaintiff on the strength of his legal title. To invite the application of this doctrine it is necessary to prove in the first place that there was a valid contract in pursuance of which possession was taken and the agreement is also of such a description that it was capable of being specifically enforced at a time when the subsequent suit for ejectment came to be determined. The doctrine cannot, therefore, be of any assistance in the case of a contract with a minor, as there can be no valid agreement with him. (*Mukherjea, J.*) HARI PADA MUKHERJEE *v.* ELOKESHI DEVI. 189 I.C. 249=13 R C 61=71 C L.J. 144=44 C. W.N. 357=A I.R. 1940 Cal. 254.

——*Suit for—Duty of plaintiff to prove his title.*

EJECTMENT.

When a person is suing for ejectment, he must succeed on proof of his own title and not merely on the absence of title in the defendant. (*Varadachariar and Stodart, JJ.*) KADAMBERI DEVASWOM URALAN *v.* SECRETARY OF STATE. **162 I.C. 37=8 R.M. 930=1936 M.W.N. 854=A.I.R. 1936 Mad. 191.**

——*Suit for—Proof required of plaintiff.*

A suit for ejectment must fail until the plaintiff proves that he was in possession within 12 years of the suit. (*Sen, J.*) MEAH KHA *v.* SERAJUDDIN SARDAR. **A.I.R. 1940 Cal. 65.**

ELECTIONS.

See also (1) GOVERNMENT OF INDIA ACT, (1935), SCH. V, PARA. 20.
(2) MADRAS LOCAL BOARDS ACT (1920) —ELECTION RULES.

——*Application to set aside—Allegations of corrupt practice—Proof of—If in the nature of criminal charges—Corrupt mind in agent—If ground for finding against candidate.*

The trial of an election petition is not governed by the rules applicable to a criminal case. Allegations of corrupt practices in an application to set aside an election are not in the nature of criminal charges and need not be proved with the same strictness. A "corrupt mind" in the agent of a candidate is sufficient to justify a finding against the candidate in an election case, unlike in the case of a criminal charge. (*Mc Nair, J.*) NASIRUDDIN AHMED *v.* HAJI MAHAMMAD YUSUF. **63 Cal. 825=165 I.C. 489=9 R.C. 404=40 C.W.N. 741.**

——"Approbate and reprobate"—Applicability —Question as to legality of document—Conduct of parties—Relevancy. *See* C. P. CODE, S. 47. **41 Bom.L.R. 170.**

——Award on arbitration—Order for filing—Plaintiff executing order as decree in part—If estopped from contending that there is no executable decree—Estoppel against statute. *See* C. P. CODE, S. 47—BAR OF SUIT—AWARD ON ARBITRATION. **41 Bom.L.R. 170.**

——*Candidate and agent—Responsibility of former for acts of latter—Proof of agency—Creation of relationship—Actual and direct appointment or express entrustment—If necessary.*

There can be no doubt that a candidate standing for election at an election is responsible for all the misdeeds of his agent committed within the scope of his authority. Certain guiding principles have been laid by authority. A man may become the agent of another either by actual employment or by recognition and acceptance. So to establish agency it is not necessary to show that the candidate himself knew of and accepted voluntary service. Knowledge and acceptance by other persons in control is sufficient for the purpose. It has to be made out, however, that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some material part of the business of the election which ordinarily is performed, or is supposed to be performed, by the candidate himself. The entrustment may be by implication, but that implication ordinarily must arise from the knowledge which, it appears, that the candidate has of the part which the person is taking in the election. (*McNair, J.*) NASIRUDDIN AHMED *v.* HAJI MUHAMMAD YUSUF. **63 Cal. 825=165 I.C. 489=9 R.C. 404=40 C.W.N. 741.**

ELECTRICITY ACT (1910), S. 2.

——Election offence—Person having no vote in ward in which election takes place—Right to make complaint. *See* BENGAL MUNICIPAL ACT, S. 34. **43 C.W.N. 1063.**

——*Nomination paper—"Signature"—Meaning —Candidate affixing rubber stamp impression of his name, address, with his own hand—Impression not facsimile of signature—No impression against signature column—If properly signed.*

Where a document, such as nomination paper in respect of an election, is required to be signed, a signature by means of a rubber stamp is sufficient. It is not necessary that the stamp should be facsimile of the signature if the document is written in his hand. Nor is it necessary that the signature should be at the foot of the document. It is sufficient if it is so placed as to show that it is intended to relate and refer to and that in fact it does refer to every part of the document when a nomination paper is among other things required to be signed by a candidate and also to contain the full name of the person nominated and his address etc., if the name and address etc., are stamped by the candidate himself, that is a sufficient compliance with the requirements, and the nomination paper is a proper and valid one, though nothing is inserted against the space marked signature and though the stamp is not the facsimile of the candidate's signature. If the nomination paper is not properly signed in any sense and does not comply with the requirements, it cannot be allowed to be signed after the expiration of the date fixed for its being sent in. A signature put subsequently to the date fixed cannot make it valid retrospectively. (*Engineer, J.*) RATANSEY DAMJI *v.* RATANSEY VERJI. **184 I.C. 628=12 R B. 188=41 Bom.L.R. 524=A.I.R. 1939 Bom. 335.**

——What constitutes. *See* SUCCESSION ACT, SS. 180 AND 181. **1939 M.W.N. 280.**

ELECTIONS OFFENCES AND INQUIRIES ACT (XXXIX OF 1920), S. 12—*Order for costs—Order passed in execution—Appeal.*

An appeal lies against an order passed by a Civil Court in the course of the execution of an order for costs awarded by the Governor on an election petition. (*Nasim Ali and R.C. Mitter, JJ.*) ABDUL JABBAR PALWAN *v.* AZIZAR RAHMAN MEA. **172 I.C. 682=10 R.C. 406=67 C.L.J. 129 =41 C.W.N. 893=A.I.R. 1937 Cal. 425.**

ELECTRICITY ACT (IX OF 1910)—*Right of Electric Supply Co. to demand fee for test—U. P. Electric Supply Co. conditions of supply—Paras. 9 (2) and 11—Constructions.*

Where a consumer intended to substitute a motor of smaller horse power in the place of one with a higher horse power and wrote to the U. P. Electric Supply Co. about it and asked them to make the necessary examination, it was held that the Company was not entitled under either Para. 9 (2) or para. 11 of the conditions of supply to demand a testing fee for that purpose. (*Mulla, J.*) LADLI PRASAD ZUTSHI *v.* U. P. ELECTRIC SUPPLY COMPANY, LTD. **1939 A.W.R. (H.C.) 417=A.I.R. 1939 All. 498.**

——**S 2 (c)** — Consumer — Meaning of. *See* ELECTRICITY ACT, S. 37 (4)—RULES UNDER R. 109 **A.I.R. 1938 Pat. 15.**

ELECTRICITY ACT (1910), S. 2.

——S. 2 (c) and R. 106—*"Consumer"—Meaning of.*

In order to hold that a person is a "consumer" as defined by S. 2 (*c*) of the Electricity Act, it would *prima facie* be enough to prove either that energy was supplied for the use of that person,or that that person was the owner or occupier of premises connected up with the licensee's electric system. If either of these is proved that person is a consumer under R. 106 of the rule. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO. LTD. *v.* HARI PRASAD SAHA. 172 I.C. 940=4 B.R. 203 =10 R.P. 365=39 Cr.L.J. 206=1937 P.W.N. 1017=18 Pat.L.T. 986=A.I.R. 1938 Pat. 15.

——S. 2 (c)—*"Consumer"—Manager of company if.*

Where the registered consumer and the person supplied with the energy is the proprietor of a company, the manager of the company cannot be held to be a consumer within the meaning of S. 2 (*c*) of the Electricity Act. The premises of the Company are not the premises of the manager. The fact that the manager receives the electric bills, signs them and pays the bills cannot make him a consumer. (*Dhavle, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* PROFULLA KUMAR GHOSAL. 175 I.C. 273=4 B.R. 563=39 Cr.L.J. 549=10 R.P. 603=1938 P.W.N. 182=19 Pat.L.T. 141=A.I.R. 1938 Pat. 243.

——S. 2 (n) — "Works" — Supply line — If "works". *See* ELECTRICITY ACT, S. 44 (*b*) AND R. 31 (1). 41 Bom.L.R. 878.

——Ss. 3, 21, 22 and 23—*Grant of license by Local Government—Powers and duties of licensee—Right to be charged by licensee on consumers—Restrictions as to—Relations between licensee and consumer—How far regulated by contract.*

A license given by the Local Government to a person under the Electricity Act confers the right on the licensee to supply electric energy in a specified area. Certain statutory powers and duties are conferred and imposed on the licensee. These powers are given for the purpose of enabling licensee, who undertakes a public undertaking, to construct his work, his plant, service mains, etc., and to maintain them, and certain duties are also imposed on him for the safety of the public or individuals. The undertaking being for public benefit, a duty is imposed on the licensee to supply energy to any person who wants to take a supply of energy, subject to certain conditions laid down either in the Act or in the Schedule which is incorporated in the license, and subject to any addition or modification which the Local Government may make. The licensee cannot show undue preference to any particular consumer in the matter of rates; subject to this he is empowered to regulate his relations by agreement with his consumers, but even here there are restrictions imposed. He cannot in his agreement with his consumers insert any condition whatever, but only such conditions as are consistent with the Act or his license and to which previous sanction of the Local Government had been obtained. Subject to these restrictions, the legislature has intended the rights between a licensee and a consumer to be regulated by contract. (*R. C. Mitter, J.*) SAILA BALA RAY *v.* CHAIRMAN, DARJEELING MUNICIPALITY. 63

ELECTRICITY ACT (1910), S. 12.

Cal. 1047=162 I.C. 811=8 R.C. 660=40 C.W.N. 789=63 C.L.J. 595=A.I.R. 1936 Cal. 265.

——S. 5 (f)—Scope of—Act how far affects C. P. Code. *See* C. P. CODE, SS. 60, 4, AND ELECTRICITY ACT, S. 5 (*f*). 1939 A.L.J. 983.

——S. 9 (2)—*Applicability—Issue of debenture bonds, without sanction of Government—Debenture trust deed, transferring property to trustees, and creating a charge—Extent of its validity.*

Where a license company for supply of electricity executed without the consent of Government, a debenture trust deed whereby the whole undertaking was transferred to trustees for debenture holders and also purported to create a mortgage over the entire property of the company and it further purported to create a charge over the property in favour of the debenture-holders, it was held that the deed so far as it intended to operate as a transfer of the properties to the trustees was void in view of the provisions of S. 9 (2) of the Electricity Act and that it was similarly void in so far as it purported to create a mortgage but that it was valid in so far as it purported to create a charge which entitled the debenture-holders to rank as secured creditors in the winding up of the company. A charge could not be regarded as a transfer either *in presenti* or *in futuro*. (*Thom, C.J. and Ganga Nath, J.*) MANMOHAN DAS *v.* OFFICIAL LIQUIDATORS. 1940 A.L.J. 449=1940 A.W.R. (H.C.) 413=A.I.R. 1940 All. 458.

——S. 9 (2) and (3)—*Licensee taking in partners and vesting building, machinery and license, etc., in partners—Consent of Local Government not obtained—Transaction, if void.*

The word 'transfer' is a word of very whole meaning and includes every transaction whereby a party divests himself or is divested of a portion of his interest, that portion subsequently vesting or being vested in another party. The word 'undertaking' includes all lands, buildings, machinery, lines of supply, good will, etc.; in fact everything which appertains to the supply of electricity under the license. Where a licensee took in partners and the partnership deed vested the buildings, machinery books, papers and the license of electricity in the partner without the previous consent of the Local Government,

Held, that the licensee transferred a part of his undertaking within the meaning of S. 9 (2) and the transaction being without the previous consent of the Local Government was void. (*Baguley, J.*) MA KYIN HONE *v.* ONG BOON HOCK. 167 I.C. 707=9 R.R. 326=A.I.R. 1937 Rang. 47.

——S. 12 (1) and (2)—*Powers of licensee—Limits—Placing of works on private and public lands—Consent of persons concerned—Necessity—Right to compensation or rent.*

The Electricity Act of 1913 does not authorise a licensee to place any work on any private lands without the consent of the owner or occupier, except in the case provided for by the first proviso to S. 12 (1). But in the case of lands dedicated to public use, the Legislature has clearly intended that the licensee would be able to place its works without the consent of the authorities in charge of such lands and without paying any compensation for the same. The Local Government might while granting the license insert a

term in it regarding rent or compensation for the use of such lands and in such cases undoubtedly a duty to pay rent or compensation will arise. (*Mukherjea, J.*) BARRACKPORE MUNICIPALITY *v.* BARRACKPORE ELECTRIC SUPPLY CORPORATION, LTD. **I.L.R. (1937) 2 Cal. 746=173 I.C. 55=10 R.C. 485=41 C.W.N. 1045=66 C.L.J. 544=A.I.R. 1937 Cal. 521.**

——S. 19—*Duty of the licensee—Infringement of rights of others—When justified—Licensee, if can be restrained by injunction from infringing.*

S. 19 of the Electricity Act primarily prohibits the licensee from doing anything which may amount to a nuisance, in the exercise of the powers given by the Act and by the license. Any infringement of any private right could only be justified on proof of the fact that without infringing those rights, the duties imposed by the licence could not be carried out. Considerations of public welfare do not warrant an infringement of private rights, unless it is expressly or by necessary implication authorised by statute. The duty cast on the licensee by S. 19 is enforceable at law. There is nothing in the Electricity Act to relieve the licensee from the liability to an action for injunction restraining him from infringing the rights of others. (*Iqbal Ahmad and Bajpai, JJ.*) FAIYAZ HUSSAIN *v.* MUNICIPAL BOARD, AMROHA. **I.L.R. (1939) All. 237=181 I.C. 964=11 R.C. 636=1939 A.L.J. 19=1938 A.W.R. (H.C.) 131=A.I.R. 1939 All. 280.**

——S. 21 (2)—*Rule made by Khattar Electric Engineering and General Supply Company providing for minimum charge—If* ultra vires.

The rule made by Khattar Electric Engineering and General Supply Co., Ltd., Dera Ismail Khan, providing that every consumer shall pay a minimum charge of Rs. 25 per annum, had not been made with the approval of the Government. The fact that in 1936 the company had addressed a letter to the Chief Engineer on the subject and had received the reply that in the case of each consumer the recovery of the minimum charge was lawful from the date of the contract entered into by that consumer with the company is no approval of the rule and therefore the rule is *ultra vires*. (*Mir Ahmad, J.*) KAKA RAM *v.* KATTAR ELECTRICAL ENGINEERING & GENERAL SUPPLY CO. **11 R. Pesh. 66=181 I.C. 245=A.I.R. 1939 Pesh. 8.**

——S. 23 (3) (c)—*Scope — Charge under—Power of licensee to levy—Minimum charge—If can be levied under—Necessity for agreement with consumer.*

S. 23 (3) (*c*) contemplates charges made on the basis of consumption. It does not authorise a licensee to levy minimum charges without any agreement with the consumer. Nor can the licensee invoke Cl. (*c*) of S. 23 (3) to support its claim for minimum charges when the Local Government has not exercised their powers under that clause by a notification under it. A minimum charge is not really a charge which has for its basis the consumption of electric energy. It is really based on the principle that every consumer's installation involves the licensee amount of capital expenditure in plant and mains on which he must have a reasonable return. He gets a return when energy is actually consumed. in the shape of payment for energy consumed. When no such energy is consumed, or a very small

amount is consumed in a long period, he, is allowed to charge minimum charges by his license, but these minimum charges are really interest on his capital outlay incurred for the particular consumer. Chapter XI-A of the Schedule alone empowers or authorises the licensee to levy minimum charges. (*R. C. Mitter, J.*) SAILA BALA RAY *v.* CHAIRMAN, DARJEELING MUNICIPALITY. **63 Cal. 1047=162 I.C. 811=8 R.C. 660=40 C.W.N. 789=63 C.L.J. 595=A.I.R. 1936 Cal. 265.**

——S. 24 (1)—*Notice under—If essential—If can be waived.*

The provision in S. 24 (1) of the Electricity Act requiring not less than seven days' clear notice is one purely for the protection of the individual so that his electrical energy will not be stopped without reasonable notice, and no question of public policy is involved in it; and if the individual concerned is prepared to waive that notice, he can do so. (*Pollock, J.*) NAGPUR ELECTRIC LIGHT AND POWER CO. *v.* S. R. PANDIT. **20 N.L.J. 200=171 I.C. 640=10 R.N. 124=A.I.R. 1937 Nag. 379.**

——S. 26 (5) and R. 31 (1)—*Relative scope—Conflict with each other.*

S. 26 (3) of the Electricity Act deals with a case of connecting a new meter with the licensee's supply line. R. 31 (1) of the Electricity Rules on the other hand does not deal with cases which S. 26 (5) contemplates. R. 31 (1) deals with the tampering of seals placed on a meter which is already working. There is therefore no conflict between S. 26 (5) and R. 31 (1). (*Wadia and Lokur, JJ.*) EMPEROR *v.* BHAGWATI. **I.L.R. (1939) Bom. 496=41 Bom.L.R. 878=185 I.C. 506=12 R.B. 251=A.I.R. 1939 Bom. 480.**

——S. 37, R. 107—*Rules under—Applicability to consumers.*

Rules 107 of the Electricity Rules framed under S. 37 of the Electricity Act imposes penalties only on licensees and owners (*i.e.*, experts). It is not applicable to consumers, who are not experts. The only rules which any non-expert can observe are Rr. 29 and 40-A which are provided for by Rr. 106 and 106-A. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* NAZARALLY NATTERWALA. **60 Bom. 770=165 I.C. 261=9 R.B. 131=37 Cr.L.J. 1124=38 Bom.L.R. 434=1936 Cr.C. 894=A.I.R. 1936 Bom. 327.**

——S. 37 (4)—*Rules under, R.* 106—*'Consumer'—Who is—S.* 2 (c).

The definition of 'consumer' includes any person who is supplied with energy by a licensee, and any person whose premises are for the time being connected for the purposes of a supply of energy with the works of the licensee. Therefore in a prosecution for offences under S. 44 and R. 106 *prima facie* it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO. *v.* HARI PRASAD SAHA. **172 I.C. 940=10 R.P. 365=4 B.R. 203=39 Cr.L.J. 206=18 P.L.T. 986=1937 P.W.N. 1017=A.I.R. 1938 Pat. 15.**

——S. 37 (4)—*Rules under, R.* 106—*If* ultra vires.

Quaere.—Whether R. 106 of the rules framed under the Electricity Act is *ultra vires* of the

ELECTRICITY ACT (1910), S. 37.

rule making power conferred by S. 37 (4). (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* HARI PRASAD SAHA. 172 I.C. 940=10 R.P. 365=4 B.R. 203=39 Cr.L.J. 206=18 Pat.L.T. 986=1937 P.W.N. 1017=A.I.R. 1938 Pat. 15.

——S. 37—*Rules under—Scope and effect of—If part of the statute—"Owner"—Meaning of.*

The definite policy underlying the penal rules framed under S. 37 of the Electricity Act is to make licensees and owners who are experts, having, or supposed to have some knowledge of the technical matters relating to electricity and the maintenance of electrical apparatus liable for breaches of the rules. An owner as defined under the rules is a sort of quasi licensee; a person who is not a licensee, but authorised by Government under Part III of the Act to supply energy. The rules, however, clearly are not part of the Act, and the provision in S. 38 (4) giving them the same force as if they had been enacted by the Act does not make them so. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* NAZARALLY. 60 Bom. 770=165 I.C. 261=9 R.B. 13=137 Cr.L.J. 1124 =38 Bom.L.R. 434=1936 Cr.C. 894=A.I.R. 1936 Bom. 327.

——S. 39—*Construction and scope.*

S. 39 does not say that dishonest abstraction or consumption or use of energy is theft. S. 39 means no more than that the offender is to be tried in the same way as if he had committed the offence of theft. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAH *v.* EMPEROR. 168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr.C. 1043=A.I.R. 1936 Cal. 753.

——Ss. 39 and 44 (c)—*Offence falling under both sections—Charge under S. 39—Propriety.*

Where an offence falls under both Ss. 39 and 44 (*c*) the mere fact that a charge could have been made under S. 44 (*c*) does not prevent a charge made under S. 39 from being properly made especially where the offence under S. 39 is clearly established. S. 39 is in fact the major offence. (*Lord Wright*) BABU LAL *v.* EMPEROR. 65 I.A. 158=I.L.R. (1938) 2 Cal. 295=32 S.L.R. 476=1938 O.L.R. 189=1938 M.W.N. 505=1938 O.A. 398=19 Pat.L.T. 343=1938 A.L.R. 309= 10 R.P.C. 250=4 B.R. 490=39 Cr.L.J. 452=67 C.L.J. 161=43 Bom.L.R. 787=42 C.W.N. 621= 1938 A.Cr.C. 27=1938 O.W.N. 416=1938 A.L.J. 382=174 I.C. 1=1938 A.W.R. (P.C.) 116=1938 M.Cr.C. 220=1938 P.W.N. 320=A.I.R. 1938 P.C. 130=(1938) 1 M.L.J. 647.

——S. 39—*Offence under—Ingredients—Abstraction—If essential.*

Abstraction is not always a necessary ingredient for an offence under S. 39. The consuming of electricity and the regular causing of the record of that use in the shape of the figures on the dials in the meters to be altered, amounts to a dishonest user within the meaning of S. 39, and the persons causing or allowing the alteration of the figures on the dial must be deemed to have committed theft within the meaning of S. 379, Penal Code. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAH *v.* EMPEROR. 168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr. C. 1043=A.I.R. 1936 Cal. 753.

——Ss. 39 and 44 (c)—*Scope and effect—Charge under—Presumption of abstraction of and tampering with meter—Conditions for raising*

ELECTRICITY ACT (1910), S. 47.

of—Accused not proved to be consumer—Effect of.

S. 39 of the Electricity Act dispenses with direct proof of abstraction by the accused person, but does not indicate the person who is to be held liable for the constructive abstraction. S. 44 (*c*) also enables a presumption to be raised, under certain circumstances, that the prevention of a meter from duly registering itself has been knowingly and wilfully caused by the consumer in whose custody or control the meter is proved to be. But the prosecution cannot avail itself of this statutory presumption as against an accused person unless that person is shown to be a consumer within the meaning of S. 2 (*c*) of the Act. (*Dhavle, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* PROFULLA KUMAR GHOSAL. 175 I.C. 273=4 B.R. 563=39 Cr.L.J. 549=10 R.P. 603= 1938 P.W.N. 182=19 Pat.L.T. 141=A.I.R. 1938 Pat. 243.

——Ss. 39 and 44—*Scope of.*

Ss. 39 and 44, Electricity Act, are to be considered as separate enactments for purposes of S. 26, General Clauses Act. (*Derbyshire, C.J. and Costello, J.*) RASH BEHARI SHAH *v.* EMPEROR. 168 I.C. 657=9 R.C. 853=41 C.W.N. 225=38 Cr.L.J. 545=1936 Cr.C. 1043=A.I.R. 1936 Cal. 753.

——S. 44—Presumption under—When to be raised—If available against person not proved to be consumer. *See* ELECTRICITY ACT, SS. 39 AND 44 (*c*). 1938 P.W.N. 182=19 Pat.L.T. 141.

——S 44 (b)—*Construction—Works laid or connected—If to be also works belonging to licensee.*

S. 44 (*b*) of the Electricity Act does not require that the "works" laid or connected up with any other works belonging to the licensee must also be works belonging to the licensee. (*Wadia and Lokur, JJ.*) EMPEROR *v.* BHAGWATI. I.L.R. (1939) Bom. 496=185 I.C. 506=12 R.B. 251=41 Bom. L.R. 878=A.I.R. 1939 Bom. 480.

——S. 44 (b) and R. 31 (1)—*Applicability—"Works", meaning of—Meter board—Removal to new position—Breaking of seals and extension of supply line—Offence.*

"Works" as defined by S. 2 (*n*) of the Electricity Act, include electric supply lines. The point at which the supply of energy by a licensee to a consumer shall be deemed to commence, where the amount supplied is ascertained by meter, is the point at which the conductor enters the meter in view of S. 35 read with S. 19-A of the Act. The supply line up to the point at which it enters the meter constitutes "works" within the meaning of S. 2 (*n*). Where a person therefore removes the meter board to a new position after breaking open the seals which had been placed by the licensee upon the meter, laying additional lines from the former position of the meter up to its new position, his act amounts to an offence under S. 44 (*b*) of the Electricity Act as well as an offence under R. 31 (1) read with R. 122 (*a*) of the Electricity Rules. (*Wadia and Lokur, JJ.*) EMPEROR *v.* BHAGVATI. I.L.R. (1939) Bom. 496=185 I.C. 506=12 R.B. 251=41 Bom.L.R. 878=A.I.R. 1939 Bom. 480.

——S. 47—*Scope—Breach of R. 41—If punishable under S. 47.*

S. 47 of the Electricity Act deals in terms with default in complying with any of the provisions

ELECTRICITY ACT (1910), S. 50.

of the Act, or with any order issued under it, or in the case of a license with any of the conditions of his license; but it does not deal with a breach of any of the rules made under the Act. There is no rule imposing a penalty for a breach of R. 41 framed under the Act, and consequently no penalty can be imposed in respect of such a breach. S. 47 cannot be invoked for the purpose of imposing such a penalty; the section cannot be held by implication to provide a penalty for breach of the rules also. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* NAZARALLY NATTERWALA. 69 Bom. 770=165 I.C. 261=37 Cr.L.J. 1124=9 R.B. 131=38 Bom.L.R. 434=1936 Cr. C. 894=A.I.R. 1936 Bom. 327.

——S. 50—*Applicability — Prosecution under S. 379, I. P. Code read with S. 39 of the Act.*

S. 50 of the Electricity Act applies to a prosecution under S. 379, I. P. Code read with S. 39 of the Act for the theft of electricity. An offence of this nature is an offence against the Electricity Act as it would not have been an offence under S. 379, I. P. Code, if it had not been for the provisions of S. 39 of that Act. It is an offence which is created by that section and the Legislature intended S. 50 to apply to an offence of this nature. (*Allsop and Ganga Nath, JJ.*) VISHWANATH *v.* EMPEROR. 165 I.C. 689=9 R.A. 309=1936 A.W.R. 842=1936 A.Cr.C. 163=1936 A.L.J. 955=1936 Cr.C. 938=38 Cr.L.J. 53=1936 All.L.R. 930=A.I.R. 1936 All. 742.

——S. 50—*"At the instance of"—Meaning of—Prosecution by police on report from Electric Company—Whether can be instituted.*

The phrase "at the instance of" in S. 50 of the Electricity Act means merely at the solicitation of or at the request of. Where a prosecution under the Act is instituted by the police on report from the Electric Company whose officers come into Court and give evidence, the prosecution is really at the instance of the Electric Company who is a 'person aggrieved', although they may not make the immediate complaint on which the Magistrate takes cognizance of the offence. (*Allsop and Ganga Nath, JJ.*) VISHWANATH *v.* EMPEROR. 165 I.C. 689=9 R.A. 309=1936 A.W.R. 842=1936 A.Cr.C. 163=1936 A.L.J. 955=38 Cr.L.J 53=1936 All.L.R. 930=1936 Cr.C. 938 =A.I.R. 1936 All. 742.

——S. 50—*"Person aggrieved"—Meaning of—Resident Engineer in charge of management of business of Electric Supply Company—Complaint by—Maintainability.*

A person who is directly in charge of the property of an Electric Supply Company is a "person aggrieved" within the meaning of S. 50 of the Electricity Act and is competent to institute a complaint in respect of an offence against the Company, or by any tampering with its meters, or wrongful appropriation of electric current. A prosecution started on a complaint made by the Resident Engineer who is the principal officer of a company in charge of the management of their business is not illegal and is perfectly sustainable (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* HARI PRASAD SAHA. 172 I.C. 940=4 B. R. 203=10 R.P. 365=39 Cr.L.J. 206=18 Pat.L. T. 986=1937 P.W.N. 1017=A.I.R. 1938 Pat. 15.

——Sched. Cls. V, VI and X—*Scope and effect of—Obligation of licensee to supply energy to*

EMIGRATION ACT (1922), S. 2.

applicant or group of individual—Modes of charging rates—Power of licensee apart from contract.

Clauses VI and V of the Schedule to the Electricity Act cast the obligation on the licensee to supply electric energy to an applicant or a group of applicants for supply of electric energy only when the applicant or group of applicants enter into a written contract with the licensee. The only power reserved to the licensee by the Act in the matter of rates which may be exercised by him apart from contract is that he can charge on any one of the three alternative modes specified in Cls. (*a*), (*b*) and (*c*) of Sub-S. (3) of S. 23 of the Act; and even when the licensee intends to prefer to go upon the basis of S. 23 (3) (*c*), the consumer can by following the procedure laid down in Cl. X of the Schedule, compel the licensee to adopt either of the modes mentioned in Cls. (*a*) and (*b*). (*R. C. Mitter, J.*) SAILA BALA RAY *v.* CHAIRMAN, DARJEELING MUNICIPALITY. 63 Cal. 1047=162 I.C. [illegible] =R.C. 660=40 C.W.N. 789=63 C.L.J. 595=A.I.R. 1936 Cal. 265.

——Sched. Cl. XI-A—*Scope—Power to levy minimum charges—Conditions—Absence of contract—Effect—Right to sue for minimum charges.*

Ch. XI-A of the Schedule is the only provision which empowers or authorises the licensee to levy minimum charges. But such power can only be exercised by a licensee through a contract entered into with the consumer. When there is no such contract with an intending consumer, the licensee cannot claim or sue for minimum charges. (*R. C. Mitter, J.*) SAILA BALA RAY *v.* CHAIRMAN, DARJEELING MUNICIPALITY. 63 Cal. 1047=162 I.C. 811=8 R.C. 660=40 C.W.N. 789 =63 C.L.J. 595=A.I.R. 1936 Cal. 265.

ELECTRICITY RULES (1937), R. 31 (1)—Applicability—Meter board—Removal to new position—Breaking of seals and extending of supply line—Offence—Liability to conviction. *See* ELECTRICITY ACT, S. 44 (b) AND R. 31 (1). 41 Bom.L.R. 878.

——R. 31 (1)—Scope—If conflicts with S. 26 (5) of the Act. *See* ELECTRICITY ACT, S. 26 (5) AND R. 31 (1). 41 Bom.L.R. 878.

——R. 123—*Who is liable to punishment under—Workman or supervisor.*

Under R. 123 of the Indian Electricity Rules, it is not the workman who actually carries out the installation that is guilty of any offence; it is only the person under whose immediate supervision the work is carried out that is liable to punishment under the rule. (*Ismail, J.*) HANS HOTZ *v.* EMPEROR. I.L.R. (1940) All. 67=1939 A.W.R. (H.C.) 789=1939 A.Cr.C. 203=1939 A.L.J. 1032 =41 Cr.L.J. 230=185 I.C. 709=A.I.R. 1940 All. 5.

EMIGRATION ACT (VII OF 1922), Ss. 2, 16, 25 (2) (b)—*Workmen trying to leave British India by ship for work elsewhere without Local Government's permission—Assistance by proprietor of a firm in their attempt—Offence against the Act—Person who helped them to leave the place guilty of offence—Conviction whether proper.*

Where the proprietor of a Cigar Manufacturing Company in British India supported the emigration out of British India of some skilled workmen

with the purpose of their being employed by his own concern outside British India in a place called Klang, and since the requirements of S. 16 of the Emigration Act were not complied with, the workmen were suspected and detained, and a prosecution was sanctioned under S. 25 (2) (*b*) of the Emigration Act against the proprietor for having helped them to emigrate, but he raised the defence that he was not responsible for any help given to them and that even otherwise they were emigrants as defined under S. 2 (1) (*b*) of the Act.

Held, (1) that an agreement to work for hire was not necessary for an offence under S. 25 (2) (*b*) of the Act and it was unnecessary to consider whether as found by the lower Court the workmen ought to have been engaged by the proprietor in his own concern at a place outside British India; (2) that since the permission of the Local Government for skilled workmen to emigrate was not obtained as required by S. 16 of the Act, the proprietor should be convicted in so far as the material S. 25 (2) (*b*) provides, that whoever assists or attempts to assist any person to emigrate or attempts to emigrate or to leave any place for the purpose of emigrating, shall be punishable with fine. (*Lakshmanarao, J.*) THE PUBLIC PROSECUTOR *v.* NATESA PILLAI. **184 I.C. 370=12 R. M. 439 (2)=40 Cr.L.J. 957=1939 M.W.N. 124=49 L.W. 381=1939 M.Cr.C. 46=A.I.R. 1939 Mad. 445=(1939) 1 M.L.J. 131.**

——Ss. 25 (2) (b) and 30 (3)—*Applicability—"Assistance"—Meaning of.*

Where a person secures steamer tickets for certain labourers to enable them to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea, he commits an offence punishable under S. 30 (3) read with S. 25 (2) (*b*) of the Emigration Act. Assistance does not mean merely either financial assistance or entering into an agreement to work for hire. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* MAHOMED ABDULLAH. **1940 M.W.N. 480=51 L.W. 679=A.I.R. 1940 Mad. 587=(1940) 1 M.L.J. 816.**

ENGLISH FINANCE ACT (1920), S. 27 (1)—Construction—Right to relief under. *See* INCOME-TAX—DOUBLE TAXATION. **(1939) I.T.R. 59.**

ENGLISH LAW—*Applicability—Feudal law—If applies to Malguzar in Central Provinces.*

The principles of English Feudal Law are clearly inapplicable to Malguzar in Central Provinces. (*Stone, C.J. and Clarke, J.*) DARYAO SINGH *v.* KUKLAY. **182 I.C. 263=12 R.N. 1=1938 N.L.J. 366=A.I.R. 1939 Nag. 91.**

——*Common Law— Applicability — Limits—Principles governing,*

Niyogi, A.J.C.—Though the Courts in India are, in the absence of any express provision of law applicable to any particular case, empowered to invoke the aid of Common law on considerations of justice, equity and good conscience, yet this can only refer to the Common law which is actually enforced by the Courts in England. Any Court in India which takes recourse to the Common law of England and seeks to apply its principles to India cannot afford to ignore the extent to which the Common law stands abrogated by statute.

Stone, C.J.—Whether a particular branch of the English Common law should be applied in India depends upon whether it is in accordance with justice, equity and good conscience, and in considering that question, the Courts have to consider the age and the circumstances in India in which the application is to be made. The history and the period at which the rule was developed should also be considered.

Pollock, J.—Though there is a strong presumption that any rule of English law is in accordance with the principles of justice, equity and good conscience in England, yet the Court in India is entitled to examine the rules in order to find out whether the rules are in accordance with the true principles of equity. (*Stone, C. J. and Pollock J., on difference between Niyogi and Staples, A.J.Cs.*) SECRETARY OF STATE *v.* RUKHMINIBAI. **I L.R. (1938) Nag. 54=174 I.C. 401=10 R.N. 386=A.I.R. 1937 Nag. 354.**

EQUITY—Court of—When gives aid—Forfeiture—Defaulter. *See* EXECUTION—EXECUTING COURT. **16 Pat. 395.**

——*Equitable right—If accrues to the defendant—Delay caused by plaintiff in bringing suit.*

No equity arises from mere delay to enforce a legal demand and no kind of equitable right can accrue to a defendant from the delay of the plaintiff in instituting his suit. The only question which can arise from the delay is whether the legal demand is barred by limitation. (*James and Rowland, JJ.*) BALKESIA *v.* BHAGWAN GIR. **15 Pat. 716=166 I.C. 451=9 R.P. 297=17 Pat.L.T. 644=1936 P.W.N. 918=3 B.R. 167=A.I.R. 1937 Pat. 9.**

——*Equitable relief—Conditions—Laches in claiming—Effect.*

Long delay and negligence of a plaintiff in seeking an equitable relief, which, in the language of equity pleadings, amounts to "laches" will disentitle him to relief even though the claim is not disputed. Nothing can call forth a Court of equity into activity but conscience, good faith, and reasonable diligence. (*Rangnekar, J.*) KISSONDAS PREMCHAND *v.* JIVATLAL PRATAPSHI & CO. **167 I. C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R. 1936 Bom. 423.**

——Right to invoke—Grounds—Relief against forfeiture—Defaulter incurring forfeiture wilfully or out of gross negligence—Right to relief. *See* EXECUTION—EXECUTING COURT. **16 Pat. 395.**

——*Rules of—Rules applicable—Power of Court to invent new rules of equity apart from English law.*

The rules of equity applicable in India are well-recognised rules which have been accepted in England. It is not open to the Courts in India to invent a new rules of equity for the first time contrary to the principles of English law. If the law of England is clear, and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law. (*Sulaiman, C.J., Thom and Bennet, JJ.*) AJHUDHIA PRASAD *v.* CHANDAN LAL. **I.L.R.(1937) All. 860=1937 A.L.J. 688=1937 A.W.R. 661=1937 A.L.R. 764=170 I.C. 934=10 R.A. 195=A.I.R. 1937 All. 610 (F.B.).**

ESTOPPEL. *See also* EVIDENCE ACT, SS. 115 AND 116.

Acquiescence.

Approbate and reprobate. (*See* ELECTION.)

Bills of lading-statements in.

Conduct.

Estoppel by conduct.
Judgment.
Landlord and tenant.
None against statute.
Point of law.
Relinquishment of rights.
Standing by.
Statement by subsequent mortgagee.

Acquiescence.

——Acquiescence—Blowing hot and cold—Party asking Court to adopt special procedure—Right to resile from. *See* APPEAL—COMPETENCY. 71 M.L.J. 281.

——Acquiescence—Conduct—Malabar tarwad—Acquisition by Karnavan in names of members of thavazhi—Several succeeding karnavans acquiescing and not challenging claim of thavazhi—New Karnavan claiming acquisition on behalf of tarwad after lapse of many years—Maintainability of claim. *See* MALABAR LAW—TARWAD. 1937 M. W.N. 1254.

——*Acquiescence and waiver—Agreement to lease land—No actual demise—Lessee entering possession erecting structures and paying* salami *but paying no rent—Lessee described in subsequent record-of-rights as tenure-holder—Notice to quit and suit for ejectment—Plea of equitable estoppel and adverse possession—Sustainability.*

On 30th Aswin, 1325 B. S., the husband of the defendant applied to the plaintiff, the proprietor of an estate, for settlement of certain homestead lands. The lands were measured and found to be 38 and odd bighas. The plaintiff agreed to make a settlement of the lands at a rental of Rs. 5 per bigha and a *salami* of Rs. 1000. No written agreement was entered into between the parties, but there was an agreement that a lease should be executed on these terms, and the defendant's husband immediately took possession and paid the *salami* of Rs. 1000. No lease was, however, executed at all, but the defendant's husband remained in possession and paid no rent. In 1925 the record-of-rights was published and in that the defendant's husband was described wrongly as a tenure-holder. The plaintiff subsequently gave notice to the defendant calling upon her to give up possession of the property, but she refused. The defendant's husband had further encroached upon the plaintiff's other land adjacent and had in course of time wrongfully taken possession of about 43 bighas of the plaintiff's other lands. Plaintiff brought a suit for possession of all the lands, and the defendant pleaded adverse possession, estoppel, acquiescence and waiver on account of the fact that buildings had been erected on the land.

Held, (1) that the defendant's husband entered into possession with the consent of the plaintiff under the agreement to lease and not under an actual demise, and was a tenant-at-will or something of that nature, and was not a trespasser and got no title by adverse possession; (2) that even assuming that the nature of possession must have changed in 1925 by reason of the entry in the record-of-rights describing the defendant's husband as a tenure-holder, in the absence of evidence that he openly asserted an adverse title until the publication of the record-of-rights, the suit having been instituted within 12 years of 1925 was not barred by limitation, even if time began to run in 1925; (3) that the notice given by

the plaintiff calling upon the defendant to give up the property amounted to an intimation that the plaintiff refused to grant a lease; (4) that the defendant's husband entered into possession under the agreement to lease and erected structures on the land not in any mistaken belief as to his rights but in assertion of rights which he correctly believed to be his. The plaintiff did not in any way mislead or encourage the defendant or her husband by not interfering because he could not have interfered so long as the proposed lessee had a right to sue for specific performance; and the fact that the plaintiff did not interfere but on the contrary stood by and permitted the structures to be erected did not bar the suit by reason of any doctrine of estoppel, acquiescence and waiver. The plaintiff was therefore entitled to possession, the defendant being given an opportunity to remove the structures if they existed; (5) that the defendant could not, however, be ejected from such of the other lands encroached upon by her husband and herself, as had been in their possession for over 12 years before suit. (*Harries, C.J. and Manohar Lall, J.*) SHIVA PRASAD SINGH *v.* MANDIRA KUMARI DEBI. 21 Pat. L.T. 277=A.I.R. 1940 Pat. 438.

——Acquiescence as instance of estoppel. *See* ACQUIESCENCE. 1939 N.L.J. 136.

——Applicability—Award treated as a compromise acted under. *See* ARBITRATION—AWARD. I. L.R. (1937) Nag. 449.

Approbate and reprobate.

——*Approbate and reprobate — Beneficiary under will—Right to repudiate conditions imposed.*

A beneficiary under a will must take the will as a whole, he cannot demand benefits under the will freed from the conditions which though burdensome the testator has considered to be necessary conditions to his bounty. He cannot both approbate and reprobate. He cannot retain the properties acquired for him and repudiate all the liabilities incurred in acquiring them. (*Broomfield and Tyabji, JJ.*) BALAJI VASUDEO *v.* SADASHIV KASHINATH. I.L.R. (1937) Bom. 1=165 I. C. 530=9 R.B. 150=38 Bom. L.R. 796=A.I.R. 1936 Bom. 389.

——*Approbate and reprobate—Blowing hot and cold—Sale deed — Vendor representing having title and receive consideration—Subsequent denial of title and disputing—Validity of sale-deed—Permissibility.*

A person cannot be allowed to make contradictory allegations or to blow hot and cold and to affirm at one time one thing and to disaffirm it at another time so as to found a claim on it; and it is clear law that a grantor or lessor cannot be allowed to dispute his own title with either the grantee or the lessee. A person executing a sale-deed representing that he has title to the properties sold and receiving consideration therefor cannot be allowed to come to Court and say that he had no title at the time he executed it. (*Rangnekar and Macklin, JJ.*) JEKA DUL *v.* BAI JIVI. 174 I.C. 24=10 R.B. 413=39 Bom. L.R. 1072=A.I.R. 1938 Bom. 37.

——*Approbate and reprobate—Party accepting benefit under order of Court—Right to challenge* —Ex parte *decree—Setting aside—Compensation awarded to plaintiff and accepted by him—Subse-*

quent application in revision against order—Competency.

It is a well-known rule that a party cannot be allowed both to approbate and reprobate. If a party has adopted an order of the Court and acted under it, he cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. If he accepts the benefit under the order, he must be considered to have acquiesced in the order passed by the Court. An *ex parte* decree was set aside and the plaintiff was awarded a sum of money to compensate him for the waste of time, money and energy caused to him. The costs were paid at once and received by the plaintiff's pleader without protest in Court plaintiff having applied to the High Court for revision of the order setting aside the *ex parte* decree.

Held, that the revision application was incompetent and the plaintiff was not entitled to attack the order in revision. (*Abdur Rahman, J.*) SATYANARAYANAMURTI *v.* SUNDARA RAO. **181 I.C. 913=11 R.M. 879 (2)=1938 M.W.N. 383=A.I.R. 1938 Mad. 603.**

———*Approbate and reprobate—Party adopting order of Court—Right to object to same afterwards—Principles—Doctrine of election.*

The law is sufficiently clear that a party who seeks the assistance of the Court is not entitled to approbate and reprobate or blow hot and cold. The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. A person who has chosen to adopt an order of Court cannot subsequently be allowed to object to it. (*Burn, J.*) SREERAMULU *v.* VENKATANARASIMHAM. **179 I.C. 466=11 R.M. 590=1938 M.W.N. 1013=48 L.W. 476=A.I.R. 1938 Mad. 1004=(1938) 2 M.L.J. 835.**

———Approbate and reprobate — Party taking benefit arising from decree— Right to appeal against decree—Benefit not conferred by decree itself—Acceptance—If bars appeal. *See* APPEAL —COMPETENCY. **40 C.W.N. 553.**

———*Approbate and reprobate—Suit for declaration, accounts and injunction in Court of second class Sub-Judge—Objection to valuation—Finding that valuation beyond Court's jurisdiction—Suit sent to first class Subordinate Judge and tried there—Appeal to High Court by defendant—Objection to forum—Competency.*

Where a suit instituted in the Court of a second class Subordinate Judge for a declaration, injunction and accounts in respect of a house which is alleged to be public or private religious property, is, on objection by the defendant, directed to be sent to the Court of a first class Subordinate Judge on the ground that the value of the suit house being over Rs. 10,000, the former Court has no jurisdiction to hear the suit, and the plaintiff accepts that position and goes to trial, he cannot, in an appeal by the defendant to the High Court from the decree in the suit, be allowed to urge a preliminary objection to the effect that an appeal does not lie to the High Court, but only to the District Court, by reason of the fact that at a later stage of the suit the prayer for accounts was deleted and therefore the suit became triable by a second class Subordinate Judge. Where the plaintiff by his conduct has allowed the suit to be heard by the first class Subordinate Judge as falling within the cognizance of the latter, he must be taken to have conceded that the valuation of the property was more than Rs. 5,000 and beyond the jurisdiction of the second class Subordinate Judge, and to have by his conduct induced the defendant to act on the basis that the suit could be tried only by the first class Subordinate Judge. He is consequently estopped from urging the objection that an appeal lies only to the District Court and not to the High Court.

Broomfield, J.—Such an objection taken to the forum of appeal is rather like approbating and reprobating. (*Broomfield and Divatia, JJ.*) GAJRAMJI JASRAMJI *v.* SOMNATH BHUDARDAS. **189 I.C. 836=42 Bom.L.R. 443=A.I.R. 1940 Bom. 242.**

———Approbate and reprobate—Suit for declaration, injunction and possession and mesne profits —Claim valued at less than Rs. 10,000 in trial Court and High Court—Application for leave to appeal to Privy Council—Plea that properties worth over Rs. 10,000—Estoppel—Right to certificate of leave to appeal. *See* C. P. CODE, S. 110. **39 Bom.L.R. 332.**

Bills of lading—Statements in.

———Bills of lading issued by shipping company without receiving goods on board—Shipper raising money from Bank on security of bills of lading and absconding—Goods seized at instance of unpaid vendors as obtained by cheating—Claim by Bank against shipping company—Estoppel against company by reason of statements in bill of lading. *See* CONTRACT—SHIPPING—BILL OF LADING. **I.L.R. (1939) Kar. 439=A.I.R. 1939 Sind 229.**

Conduct.

———Conduct—Admission to occupancy holding by general attorney of agent—Zemindar not challenging entry at settlement but getting rent enhanced by proceedings against persons admitted by agent—Denial of occupancy rights by zamindar after the lapse of over 16 years—Estoppel. *See* AGRA TENANCY ACT, SS. 17 AND 122. **1937 R.D. 1.**

———Conduct — Representation — Insolvency — Declaration of final dividend—Official Receiver regarding insolvency terminated and sending all papers to Court—Acquisition by insolvent more than 12 years later—Right of creditors to claim for distribution from the hands of vendee from insolvent. *See* PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 16 (4). **48 L.W. 788.**

———Conduct—Tenant illegally ejected and dispossessed by some only of co-sharers--Suit by latter under wrong section of Act—Subsequent ejectment suit by same co-sharers against heir of tenant—Plea by latter that plaintiffs are not his landlords—Sustainability—If barred. *See* AGRA TENANCY ACT, SS. 44 AND 99. **1938 R.D. 163=1938 A.W.R. (B.R.) 99.**

———Conduct—Trespasser claiming to hold land as permanent tenant—Landlord allowing him to remain in possession and accepting rent—Effect —Denial of permanent tenancy—Estoppel. *See* LANDLORD AND TENANT—PERMANENT TENANCY. **A.I.R. 1937 Pat. 374.**

ESTOPPEL.

———Consent decree—If creates. *See* COMPROMISE—CONSENT DECREE. 1940 A.W.R. (H.C.) 504 =1940 A.L.J. 679.

———*Doctrine of—Applicability to contracts of statutory bodies.*

The ordinary laws of estoppel that arise out of the conduct of the principals apply equally well to contracts entered into by a District Board through its executive officers, with different busowners in respect of their licenses. (*Horwill, J.*) PRESIDENT, DISTRICT BOARD, KISTNA *v.* LAKSHMAYYA. 177 I.C. 126=11 R.M. 252=1937 M.W.N. 1223 (2)=A.I.R. 1938 Mad. 227=(1938) 1 M.L.J. 391.

———Equitable estoppel — Representation — Agreement of permanent lease by limited owner effected verbally—Lessee entering in possession but not suing for specific performance within period of limitation—Erection of pucca house by lessee—Suit by lessor for ejectment—Bar of—Equitable estoppel—If arises—Right to compensation for improvements. *See* LANDLORD AND TENANT—EJECTMENT. 19 Pat.L.T. 791.

Estoppel by Conduct.

———*Estoppel by conduct, neglect or representation—Basis of rule—Pledge of Railway receipts—Pledgee handing them over to pledger in the course of business—Repledging of them—Original pledgee, if estopped.*

Though estoppel is described as mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess, is described as estoppel by negligence or by conduct or by representation or by holding out of ostensible authority. Such estoppel is based on the existence of duty which the person estopped owes to the person led into the wrong belief or to the general public of whom the person is one. There is a breach of duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. *English case law reviewed.* Bank *A* advanced loans to a merchant on the pledge of railway receipts. Following the usual practice, the railway receipts were handed over back to the merchant for the specific purpose of clearing goods represented by the railway receipts from the Port Trust and storing them in the bank's godowns. The bank did not put its stamps on the railway receipts. The merchant fraudulently pledged the same railway receipts to bank *B* and obtained a second advance. Thereupon bank *A* brought against bank *B* an action for conversion. Bank *B* raised a plea of estoppel against bank *A*.

Held, that the plea of estoppel could not be availed of. Bank *A* did not owe any duty to bank *B* in the matter. There was no relationship of contract or agency. There was also no representation by bank *A* which had no reason to think that it was representing to any body that the merchant had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchant with

them. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was at the best an ambiguous document. Its possession no more conveyed a representation that the merchant was entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It was not like a negotiable instrument. The document on its face conveyed no representation when presented that the merchant was invested with full disposing power. Bank *A* therefore was entitled to rely on the rule of law that no one could pass a better title than he possessed.

Held further, that the failure of bank *A* to place its stamps would make no difference. It was neither the practice nor was there any duty as between the two banks to adopt such a practice. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. 65 I.A. 75=I.L.R. (1938) Mad. 360=1938 A.L.R. 100=10 R.P.C. 169=1938 P.W.N. 152=1938 A.W.R. (P.C.) 90=66 C.L.J. 510=1938 O.A. 312=1938 M.W.N. 552=40 Bom. L.R. 713=19 Pat.L.T. 147=32 S.L.R. 313=4 B.R. 260=47 L.W. 329=1938 A.L.J. 273=172 I.C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)=1938 O.W.N 206=A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).

———*Estoppel by deed—English law—Applicability.*

The English doctrine of estoppel by deed ought not to be applied in India in view of the dissimilarity of conditions prevailing in India. (*R. C. Mitter, J.*) DEENA BANDHU GAN *v.* MAKIM SARDAR. 63 Cal. 763=161 I.C. 468=8 R.C. 519 =40 C.W.N. 460=A.I.R. 1936 Cal. 93.

———*Estoppel by record and* res judicata—*Relative effect of—Decree creating a charge and declaring a charge—Difference.*

If a Court orders a defendant to pay plaintiff a certain sum of money on a specified date and directs that if it is not paid, property which it specifies is to be sold, those orders must be carried out and the judgment-debtor cannot evade them by transferring the property so charged to another, however innocent that other may be. The doctrine of estoppel by record applies and the transferee from the judgment-debtor after decree is bound to carry out its orders in the same way and to the same extent as the judgment-debtor himself. It is not necessary for the decree-holder to sue the transferee all over again. But when the decree is merely declaratory and does not direct the doing of a particular thing, that is when it is not executable, then an important difference arises, and the transferee, though bound by the decision in the sense that it is *res judicata*, is not necessarily bound to the same extent and in the same way as the judgment-debtor: pleas are available to him which would not be available to his transferor (*e.g.*) *bona fide* purchase for value without notice. (*Stone, C.J. and Bose, J.*) GHASIRAM *v.* KUNDANBAI. 1940 N.L.J. 1=A.I.R. 1940 Nag. 163.

———*Express provision of law—Estoppel against.*

A promise not to eject against the express provisions of the law cannot operate as an estop-

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pel. (*Sathe, J.M.*) KHEDU SINGH *v.* MAHESH. 1940 R.D. 239=1940 A.W.R. (B.R.) 144.

———*Ignorance of rights—Estoppel against statute.*

Where certain payments by way of bazar dues are made by the defendants in ignorance of their legal position, that cannot estop the defendants from questioning the right of the plaintiffs to recover such dues. Further, there can be no estoppel against a statutory provision. (*Thomas, C.J. and Bennet, J.*) RAM JIWAN *v.* HANUMAN PRASAD. 190 I.C. 143=1940 O.A. 746=1940 O.W.N. 782=1940 A.W.R. (C.C.) 357=1940 O.L.R. 535=A.I.R. 1940 Oudh 409.

Judgment.

———*Judgment—Conditions.*

Abdur Rahman, J.—There can be no estoppel by judgment or decree apart from the doctrine of *res judicata* unless the same matter is found to be in issue in the former trial as that now in question and unless the judgment was rendered on the merits. (*Pandrang Row and Abdur Rahman, JJ.*) RAMASWAMI *v.* VENKATA KRISHNAYYA. 1938 M.W.N. 224 (2)=47 L.W. 374.

———*Knowledge of execution of decree—Failure to object—If estops judgment-debtor contesting validity of decree.*

Where persons to be sued are majors a suit brought without their knowledge against them on the footing that they are minors is wrong, and the *guardian-ad-litem* appointed to represent them has no legal standing to act for them in the suit and his admission of liability is not binding on them. Such persons if they were not aware of the suit until after the decree in the suit was passed are not estopped from contesting the validity of the decree even if they became aware of the execution proceeding and did not come forward to prosecute their claims then. (*Dunkley and Braund, JJ.*) R.M.A.R.M. CHETTYAR FIRM *v.* MG. SHWE HMUN. 180 I.C. 489=11 R.R. 404=A.I.R. 1938 Rang. 468.

———Landlord and tenant—Building by tenant—Landlord not objecting. *See* LANDLORD AND TENANT. A.I.R. 1937 Pat. 391.

———Landlord and tenant—Buildings erected by tenant—Landlord if estopped from pleading non-transferability. *See* LANDLORD AND TENANT—TRANSFERABLE TENANCY. 17 Pat. 358.

———Landlord and tenant—Covenant against alienation—Forfeiture of tenancy—Right of landlord—Condonment of breach on previous occasion—If a bar. *See* T. P. ACT, S. 114. 17 Pat.L.T. 502.

Landlord and Tenant.

———Landlord and tenant—Lease contrary to law—Fraudulent representation on question of fact by lessor to lessee—Lessee believing in representation and acting thereon—Lessor, if estopped from going back on representation. *See* EVIDENCE ACT, S. 115. 17 Pat.L.T. 380 (S.B.).

———Landlord and tenant—Purchaser from tenant paying landlord's fee—Deed of purchase not specifying that tenancy is fixed rate—Question raised in pre-emption proceedings but left open—Suit by purchaser for declaration of fixed rate tenancy—Purchaser, if estopped from raising question of fixed rate tenancy—B. T. Act, Ss. 26-D and 26-F. *See* B. T. ACT, Ss. 26-D AND 26-F. A.I.R. 1936 Cal. 582.

ESTOPPEL.

———*Landlord and tenant—Purchaser from tenant recognised by landlord on payment of salami—Possession and payment of rent to landlord—Suit for ejectment—Estoppel.*

A purchased from *B*, the previous occupier, a residential house and applied to the landlord for permission to complete the purchase. The landlord willingly gave his consent to the purchase after having received certain salami. *A* was in possession of the house since the purchase and paid rent. The landlord subsequently brought a suit against *A* for ejectment.

Held, that as the landlord by his consent induced *A* to enter into possession and to pay rent, he was estopped from suing *A* for ejectment. (*Courtney-Terrell, C.J. and James, J.*) GURSHAI MAHTON *v.* JUGESHWARI PRASAD. 170 I.C. 475=3 B.R. 742 (1)=10 R.P. 133=18 Pat.L.T. 911=1937 P.W.N. 928=A.I.R. 1937 Pat. 454.

———Landlord and tenant—Under-raiyat with occupancy right—Building of house and planting of trees—If protected from ejectment—Equitable estoppel. *See* LANDLORD AND TENANT—EJECTMENT. 17 Pat.L.T. 202.

———Lease—Not by all co-sharers—Invalidity of lease—Ejectment—Lessor if estopped. *See* LANDLORD AND TENANT—LEASE. 1938 A. L. J. (Suppl.) 62.

———*Lessee allowing third person to occupy land and construct building thereon—If can later on question legality of the possession of that third person.*

The agent of the lessee of land for building purposes from Government transferred the same to a third person who got it transferred in his name from the Government. The lessee took no objection to the third person's occupation of the land and to his construction of a house thereon until the building was complete and in the occupation of the third person's tenant.

Held, that having induced the third person to believe that he was in lawful possession of the land and had a right to construct a building thereon by his conduct, the lessee was estopped from questioning the legality of the third person's possession or his right to construct the building and to remain in possession of it. (*Dunkley, J.*) MADAN GOPAL *v.* SUNDARAN. 189 I.C. 735=13 R.R. 51=A.I.R. 1940 Rang. 172.

———Minor—Plea of minority at the time of execution of mortgage. *See* CONTRACT ACT, S. 65. 1937 A.L.J. 688=A.I.R. 1937 All. 610 (F.B.).

———*Mortgagor and mortgagee—Mortgagee of sir plots—Mortgagor not losing possession—Mortgagee not objecting to rent fixed on mortgagor as ex-proprietary tenant—If can subsequently question creation of ex-proprietary tenancy.*

Where a mortgagor of *sir* plots did not lose possession and the matter was taken up at the instance of the mortgagee himself in the mutation proceedings and he did not raise any objection to the rent being fixed on the mortgagor as ex-proprietary tenant at a particular rate, he is estopped from questioning the creation of the ex-proprietary tenancy. (*Mehta, S.M. and Harper, J.M.*) GANESH TEWARI *v.* NAGESAR RAM. 1940 R.D. 197=1940 A.W.R. (B.R.) 65.

———Nature of plea—*Res judicata*—Distinction. *See* C. P. CODE, S. 11. 29 S.L.R. 455.

ESTOPPEL.

——*Negligence—When gives rise to estoppel.*

A defendant who pleads estoppel founded on the negligent conduct of the plaintiff, must, in order to succeed on the plea of estoppel, establish that there was a duty on the part of the plaintiff (or his agent) to use due care towards the party or towards the general public of which he is one. Further the negligence must be in the transaction itself, and the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result. If any fraud is alleged, such fraud must flow as a natural and uninterrupted sequence from the negligent act. (*Engineer, J.*) PURSHOTTAM *v.* SECRETARY OF STATE. I.L.R. (1938) Bom. 139=173 I.C. 522=10 R.B. 350=39 Bom. L.R. 1152=A.I.R. 1938 Bom. 93.

——*Party to a contract* ultra vires *of a statutory body—If can plead illegality of contract.*

Where certain bus-owners accepted licences from the District Board, for a period of two months only, by their very acceptance had made it impossible for the District Board to exercise any discretion in the matter and so *prima facie* would be estopped from denying that the District Board had authority to issue licences for a period of two months only. It is immaterial if the contract was *ultra vires* the Board, for the doctrine of estoppel does not depend altogether upon the legality of a contract. (*Horwill, J.*) PRESIDENT, DISTRICT BOARD, KISTNA *v.* LAKSHMAYYA. 177 I.C. 126=11 R.M. 252=1937 M.W.N. 1223 (2)=A.I.R. 1938 Mad. 227=(1938) 1 M.L.J. 391.

Point of law.

——*Point of law—Admission of counsel.*

Per *Mackney, J.*—Admission of a counsel on a point of law does not preclude the client from raising it subsequently. (*Mackney, Mya Bu and Spargo, JJ.*) MAUNG PO ZAW *v.* MAUNG AN. 1939 Rang.L.R. 83=179 I.C. 6=11 R.R. 303=A.I.R. 1938 Rang. 376.

——*Point of law—Admission by counsel—Binding nature of.*

Counsel waiving objection as to limitation does not estop his client from raising the same. (*Dalip Singh, J.*) PANNA LAL *v.* JAIN BANK OF INDIA LTD. LAHORE. 178 I.C. 288=11 R.L. 435=A.I.R. 1938 Lah. 368.

Relinquishment of rights.

——*Relinquishment of rights—Proof of full understanding—Necessity.*

The person relinquishing his right may be prevented from asserting it on the ground of estoppel, but it can be invoked only if full understanding by the executants has been proved. (*Collister and Bajpai, JJ.*) ISHAR FATIMA BIBI *v.* HANWAR FATIMA BIBI. 182 I.C. 801 (2)=12 R.A. 38=1939 A.W.R. (H.C.) 889=1939 A.L.J. 642=A.I.R. 1939 All. 348.

——*Silence—If can amount to—Minor—Mortgage by guardian—Minor though present keeping silent—If bound.*

Where a minor defendant with her mother as guardian is present at the time of execution of a mortgage-deed and the mortgage-deed does not contain any specific statement committing the defendant to any particular legal liability, there is no estoppel on the mere omission of the defendant to raise any objection or protest at the time, and defendant's share is not liable. (*Varada.*

ESTOPPEL.

chariar and Mockett, JJ.) VENKATARAMA IYER *v.* BALLAYA YESUTHASAN. 165 I.C. 478=9 R.M. 260=44 L.W. 725=1936 M.W.N. 468=A.I.R. 1936 Mad. 595.

——*Silence when amounts to representation.*

The main condition subject to which alone silence amounts to a representation is that a legal duty was owed by the representor to the representee to make the disclosure the omission of which if relied upon as creating an estoppel. (*Dunkley, J.*) ALLY MEAH *v.* MAYMYO MUNICIPALITY. A.I.R. 1940 Rang. 187.

Standing by.

——*Standing by—Company— Application for allotment of shares—Company transferring shares of another to applicant and entering his name in register of members as transferee—Applicant fully aware of transfer and entry—Subsequent objection after long time to entry of name as transferee and to be included in list of contributories—Sustainability—Right to rectification.*

If any person whose name is included in the register of shareholders of a company becomes aware that circumstances are such that if proceedings are brought against the company he would succeed in having his name removed and the register rectified, he must do so promptly. If he stands by for a long time and allows his name to remain in the register, he is holding out to the public that he is a share holder, and thereby he loses the right to have his name removed at a later stage. *B* applied to a company for allotment to him of a certain number of shares. But instead of the allotment of shares, shares belonging to another shareholder were transferred to him and he was entered in the register of the company as a transferee of those shares. *B* was aware of this transfer to him and entry of his name and he stood by without objecting to the same. Subsequently, after the company was ordered to be wound up, the Official Liquidator applied to have *B's* name, included in the list of contributories. *B* objected, and also applied for rectification of the register of members of the company by removal of his name from the register.

Held, that *B* having stood by in the way he did with full knowledge that his name was on the register by reason of his consent that shares should be transferred instead of being allotted to him, he was liable to be included in the list of contributories in respect of the shares transferred in his name, and that he was not entitled to an order for rectification of the register of members. (*Gentle, J.*) GARLAND PETROLEUM CO. (MADRAS), LTD., *In the matter of.* 189 I.C. 309=13 R.M. 239=49 L.W. 431=1939 M.W.N. 666=A.I.R. 1939 Mad. 803=(1939) 2 M.L.J. 122.

Statement by subsequent mortgagee.

——*Statement by subsequent mortgagee that he would not enforce his mortgage—If could estop him.*

A mere statement by the subsequent mortgagee in the witness box that he would not enforce his mortgage cannot estop him from enforcing his legal rights. A mortgagee's right is created by a registered deed and can only be extinguished by a registered deed. (*Stone, C.J. and Niyogi, J.*) ALL INDIA RAILWAYMEN'S BENEFITS FUND LTD. *v.* RAMCHAND HEMRAJ. I.L.R. (1939) Nag. 357=

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186 I.C. 244=12 R.N. 194=1939 N.L.J. 238=A.I.R. 1939 Nag. 179.

Statute.

———Statute—Deed—Clause in contravention of statute—Part severable from rest—Estoppel—If can arise from part which is good. *See* EVIDENCE ACT, S. 115. 63 C.L.J. 52.

———Statute—Estoppel against statute—Applicability of—Lease void under Chota Nagpur Tenancy Act—Ejectment. *See* EVIDENCE ACT, S. 115. 17 Pat.L.T. 380 (S.B.).

———Statute—Estoppel against—Agreement between debtor and creditor that default in payment of instalment to be treated as act of insolvency—Application by creditor to adjudicate debtor on default—Plea by debtor that default is not act of insolvency—If barred. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 9 (*g*). 46 L.W. 515.

———Statute—Estoppel against—Award ordered to be filed—Absence of judgment or decree in terms—Plaintiff treating order as decree and executing in part—Subsequent suit on basis that there is no executable decree—If barred. *See* C. P. CODE, S. 47. 41 Bom.L.R. 170.

———*Suit in ejectment of non-occupancy tenant—Description of tenant as occupancy tenant—If can operate as estoppel.*

In a suit to eject a tenant as a non-occupancy tenant the mere description of such a tenant as an occupancy tenant would not constitute an estoppel as against the landlord. (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAD KUMAR SINHA. 1938 R.D. 4=1938 A.W.R. 16 (B.R.).

———Will in contravention of statute—Devisee acting upon it—Dispute between co-devisees—Invalidity of will—Bar in pleading. *See* C. P. TENANCY ACT, S. 5. 1938 N.L.J. 181.

EVIDENCE. *See also* CRIMINAL TRIAL-EVIDENCE.

Account books.
Admissibility.
Admission.
Age.
Ancient transactions.
Appraisement Record.
Appreciation.
Birth register.
Burden of proof.
Certified copy.
Child witness.
Circumstantial evidence.
Commission evidence.
Confession.
Criminal trial.
Cross-examination.
Defendant as plaintiff's witness.
Document.
Expert evidence.
Heading of deposition.
Judgments.
Maps.
Marriage.
Medical certificate.
Misappreciation and Misapprehension.
Mutation proceedings.
Panchayatnamas.
Partition entries.
Pedigree.
Pleadings.
Presumptions.

EVIDENCE.

Proof.
Record-of-rights.
Register of births and deaths.
Relationship.
Riwajiam.
Settlement Records.
Thak and Revenue Survey Maps.
Tradition.
Witness.

Account Books.

———*Account books—Failure to produce—If fatal.*

Although accounting *qua* accounting is not a part of the cause of action in a suit, omission to produce accounts by a defendant, even though the burden were on the plaintiff may in conceivable circumstances prove fatal to the defendant. (*Vivian Bose, J.*) KALYANJ *v.* TIRKARAM. 176 I.C. 675=11 R.N. 65=A.I.R. 1938 Nag. 254.

Admissibility.

———*Admissibility—Deposit of jade by A with B—Oral evidence to explain nature of deposit.*

Where certain amount of jade was deposited by *A* with *B* and the nature of the deposit is in dispute, oral evidence is admissible to show whether it was put there for safe custody only or as pledge. (*Roberts, C.J. and Leach, J.*) KYAN WIN TA *v.* DAW KHIN. 174 I.C. 475=10 R.R. 408=A.I.R. 1938 Rang. 38.

———*Admissibility—Document in two parts—One admissible and other not.*

Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole. (*Addison, Ag.C.J. and Mahomed, J.*) FAZAL DIN. *v.* KARAM HUSSAIN. 162 I.C. 404=8 R.L. 894=A.I.R. 1936 Lah. 81.

———*Admissibility—Evidence as to non-access—English rule as to inadmissibility—If applies to India.*

There is certainly nothing in the Indian Evidence Act which renders the evidence of a husband or wife there has been no access by the husband to the wife inadmissible in India. The English rule as to its inadmissibility does not apply in Indian Courts. (*Allsop, J.*) ERNEST LIONEL DONTRE *v.* ANNE RUTH DOUTRE. I.L.R. (1939) All. 573=184 I.C. 110=12 R.A. 180=1939 A.W.R. (H.C.) 420=1939 A.L.J. 478=A.I.R. 1939 All. 522.

———*Admissibility—Interlocutory order admitting evidence to go on record—Power of Court to vary the order.*

Where the Court passed an interlocutory order that the evidence was admissible, such an order can legally be varied by the Court, though in practice it is not often done. The Court therefore can hold the evidence as inadmissible which was formally held admissible. (*Jai Lal, J.*) R.C. CHAMARETTE *v.* MRS. P.E. CHAMARETTE. 172 I.C. 619=10 R.L. 352=39 P.L.R. 262=A.I.R. 1937 Lah. 176.

———*Admissibility — Objection to—If can be raised in appeal.*

When a document is tendered in evidence and no objection whatever is taken to it either as to its being secondary evidence or as to its being tendered in circumstances that would justify its being received as secondary evidence, it is too late in appeal to take the point that it should not have

been received. (*Stone, C.J.*) KEDAR NATH *v.* G. R. PRADHAN. I L.R. (1937) Nag. 68=167 I.C. 190=9 R.N. 169=A.I.R. 1937 Nag. 13.

———*Admissibility — Objection to—If can be raised in Second Appeal for first time.*

Where objections as to the admissibility of certain documents were not raised in the trial Court and there was no dispute as to their relevancy, such objections cannot be allowed to be raised in second appeal, for it would amount to retrying the case, a thing not permissible in second appeal. (*Ismail, J.*) BINDESHWARI *v.* RAM RAJ SINGH. 179 I.C. 974=11 R.A. 401=1939 A L J. 128=1938 A.W.R. (H.C.) 776=A.I.R. 1939 All. 61.

———*Admissibility—Objection to—When can be raised in appeal.*

There is a clear distinction between waiving the necessity for formal proof of a document, an objection which, if raised in the trial Court, might have been made good by the opposite party, and objecting to the admission of evidence which the law forbids to be received. In the latter case acquiescence in the Court below is no bar to raising the objection in a superior Court. (*Rowland, J.*) SRI MAHABIRJI *v.* RAM NATH KASARWANI. 166 I C. 209=9 R P. 267=1937 P.W.N. 2=3 B. R. 139=A.I.R. 1936 Pat. 634.

———Admissibility—*Post mortem* report—Admissibility and weight of in murder trial. *See* CR. P. CODE, S. 509. 1936 M.W.N. 110=43 L. W. 305.

———*Admissibility—Report of Revenue Officer conducting sale—Officer not examined—Admissibility.*

The report of a Revenue Officer conducting a sale is not admissible in evidence when he himself has not been examined. Such a report is not on the same footing as an order passed by him in his judicial capacity. (*Agha Haidar, J.*) DATA RAM *v.* THE PUNJAB NATIONAL BANK LTD., MULTAN. 38 P.L.R. 515.

———*Admissibility Road cess returns.*

The Road Cess Act does not stand in the way of admission of road cess return filed by landlords and the statements made by all the proprietors can be used by one of them against the other. (*Mohammad Noor, J.*) MAHABIR RAM MARWARI *v.* BHADAI MANDER. 172 I.C. 129=10 R.P. 287=A.I.R. 1937 Pat. 561.

———*Admissibility—Statements in prior suit.*

In a suit the point whether plaintiff's father *M* was bandhu of *J* was in question. The plaintiff produced a pedigree showing that *M* was bandhu and in proof of the pedigree relied upon certain previous statements of the plaintiff's father *M* made in a suit filed on behalf of the Secretary of State for India claiming the property left by *J* on the ground that no heir of *J* was in existence and that the property had escheated to the Crown. Thus the question of the alleged relationship of *M* with *J* was in controversy in that suit.

Held, that the statements of *M* relied upon were inadmissible. (*Bennet and Varma, JJ*) BRIJ MOHAN *v.* KISHUN LAL. 176 I.C. 441=1938 A.L.J. 670=1938 A.W.R. (H C.) 533=10 R.A. 132=1938 A.L.R. 662=A.I.R. 1938 All. 443.

———*Admissibility — Test —Relevant point of time.*

The relevant point of time in the proceedings at which the condition of admissibility must be fulfilled is the time when it has to be admitted by the Court before which the evidence is produced and relied on and not the moment when the case is decided. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. 1940 N.L.J. 459=A.I.R. 1940 Nag. 340.

———*Admissibility—Witness examined in chief but not cross-examined.*

The deposition of a witness who has been examined in chief but has not been cross-examined on account of certain circumstances which made the cross-examination impossible, need not be ignored and can be treated as evidence on the record. The weight to be attached to such evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. (*Rowland, J.*) MT. HORIL KUER *v.* RAJAB ALI. 160 I.C. 445=8 R.P. 362=17 Pat.L.T. 101=A.I.R. 1936 Pat. 34.

Admission.

———*Admission—Admission that a tenant is an occupancy tenant—Truth of—Presumption as to.*

What a man admits to be true must reasonably be presumed to be so. So where there is an admission made in a kabuliat, that a tenant is an occupancy tenant, the admission must be taken or at least presumed to be correct in the absence of evidence to the contrary. 29 All. 184 (P.C.), Foll. (*D.N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v.* KRISHNA CHANDRA MUKHERJEE 165 I.C. 682=9 R.C. 445=63 C.L.J. 72=40 C.W.N. 722=A.I.R. 1936 Cal. 249.

———*Admissions—Admissibility—Rule as to.*

In certain cases a witness may be asked to give particulars of what a person has said shortly after an occurrence and a complaint that such a person may have made shortly after an occurrence is admissible not as being evidence of the facts complained of but as being evidence of the consistency of the story of the complainant. However, this is an exception to the general rule of evidence which is, that statements may be used against a witness as admissions, but one is not entitled to give evidence of statements on other occasions by the witness in confirmation of his testimony. Hence, where a dispute between *A* and *B* is whether *A* had agreed to make a purchase from *B* on a certain date, a statement in support of *B's* allegation in letter written by *B* to a third party is inadmissible either in examination-in-chief or in cross-examination. (*Lord Porter.*) RICHARD GILLIE *v.* POSHO LTD. 182 I.C. 27=11 R P.C. 284=50 L.W. 81=41 P.L.R. 622=A.I.R. 1939 P C. 146 (P.C.).

———*Admission—Binding nature of.*

An admission by a party is binding on him in the absence of an explanation offered by him as to why he made it. (*Bhide, J.*) KISHAN LAL *v.* LOTAN SINGH. 39 P.L.R. 876.

———*Admission of—Court refusing to admit evidence in the first instance—Jurisdiction to take same into consideration subsequently.*

A Court which refuses to accept a piece of evidence in the first instance has no jurisdiction to take the same into consideration at a later stage unless some explanation or reason can be given by the party producing the same. (*Wort,*

J.) RAM KESHAN CHAMAR *v.* RAMSOHAG CHAMAR. 5 B.R. 736=12 R.P. 12=182 I.C. 407=A.I.R. 1939 Pat. 530.

———*Adoption—Statements recorded in official documents—Value of.*

A person brought a suit for establishing that he was the adopted son of a dismissed Sirdar and as such entitled to succeed to the Sirdarship. In evidence documents coming from official sources recording statements as to adoption made to the officials in the locality not merely by the plaintiff himself in the presence of others but also by another and by the dismissed Sirdar himself were produced These statements were made at a time when no disputes had arisen and were made in connexion with a matter of local interest, *viz.*, the appointment of a new Sirdar.

Held, that the documents carried greatest possible weight and could not be dismissed as mere self-assertions. (*Lord Russell of Killowen.*) ARJUNO NAIKO *v.* MODONOMOHONO NAIKO. 1940 A.L.J. 671=1940 A.W.R. (P.C.) 166=1940 O.W.N. 1108=1940 O.A. 960=A.I.R. 1940 P.C. 153 (P.C.).

Age.

———*Age—Register of births and deaths—Entry in—Value of.*

An entry as to age in the register of births and deaths is *prima facie* evidence of what is stated in it. (*Costello and Panckridge, JJ.*) ALLIANZ UND STUTTGARTER LIFE INSURANCE BANK, LTD. *v.* HEMANTA KUMAR DAS. I.L.R. (1938) 2 Cal. 457=178 I.C. 554=11 R.C. 374=42 C.W.N. 855=A.I.R. 1938 Cal. 641.

———*Age—Statements as to in depositions—Villagers—Value to be attached.*

It is a well-known fact that when the age is not in issue, villagers are particularly careless in stating their age. As such the statement of age cannot be of such positive character in determining a particular issue long after the date, when the determination of age was not one under consideration when the statement was made. (*Mehta, J. M.*) NARSING OJHA *v.* MT. DULARI KUAR. 1939 A.L.J. (Supp.) 48=1939 A.W.R. (B.R.) 44=1939 R.D. 164.

Ancient transaction.

———*Ancient transaction—Suit to redeem mortgage—Absence of evidence due to lapse of time—Presumptions—If can be relied on to fill up gaps in evidence.*

In a suit for redemption of an old mortgage, where the original mortgagor is dead, and there is a lack of evidence owing to lapse of time presumptions are permissible to fill in gaps in the evidence which has been obliterated by the passage of time. (*Bose, J.*) DEONARAIN BALRAM *v.* KAMTA. I.L.R. (1936) Nag. 167=171 I.C. 174=10 R.N. 96=A.I.R. 1937 Nag. 43.

Appraisement Record.

———*Appraisement record—Requisites to be proved.*

Before a record of appraisement can be treated as in itself evidence on which liability may be imputed it should be proved that the appraisement was made with proper formality. In other words unless the *Raiyat* has definitely and formally accepted the *danabandi* by signing the record of appraisement; or unless it is demonstrated that the *danabandi* was carried out in something of the manner of a proceeding in arbitration, the landlord is required to prove not only that the *danabandi* was made but that the estimate of outturn was correct. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) PRATAP NARAIN JHA *v.* RAMASRAY PERSHAD CHAUDHURY. 17 Pat. 120=10 R.P. 437=1938 P.W.N. 36=4 B.R. 324=173 I.C. 724=19 Pat.L.T. 4=A.I.R. 1938 Pat. 81 (S.B.).

Appreciation.

———*Appreciation—Evidence got by rote.*

The fact that the evidence of witnesses bears the appearance of having been got by rote or learned by heart, does not necessarily make it unreliable. Evidence substantially true not infrequently assumes too perfect a form and witnesses such as children not infrequently get a story by heart which is none the less a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the test of the evidence and the circumstances of the case. (*Lord Roche.*) BHOJRAJ *v.* SITARAM. 40 C.W.N. 257=43 L.W. 120=1936 O.W.N. 38=19 N.L.J. 36=160 I.C. 45=8 R.P.C. 136=1936 A.W.R. 37=38 P.L.R. 69 (2)=1936 M.W.N. 184=38 Bom.L.R. 344=63 C.L.J. 42=1936 A.L.J. 755=1936 All.L.R. 95=1936 O.L.R. 63=1936 P.W.N. 134=A.I.R. 1936 P.C. 60=70 M.L.J. 225 (P.C.).

———*Appreciation—Evidence of witness—Power to accept part as true and reject rest as false.*

It cannot be said to be an axiom of law that every Court must reject examination in chief whenever cross-examination does not confirm it. A Court may believe any witness or any part of any witness's evidence and disbelieve any other part, and it is entitled to come to the conclusion that the examination-in-chief is true and that statements in cross-examination are false. (*King, J.*) NOOKU NAIDU *v.* EMPEROR. 1937 M.W.N. 986.

———*Appreciation—Judge accepting part of evidence of witness and rejecting rest—Legality.*

There is nothing illegal in a Judge of fact accepting one portion of a witness's testimony and rejecting another. (*Vivian Bose, J.*) PADESHI RAMABHAROSE *v.* DEVANATH. 165 I.C. 558=9 R.N. 93 (1)=A.I.R. 1936 Nag. 273.

———*Appreciation—Version spread over several consecutive stages.*

When dealing with a version spread over several consecutive stages, it is inevitable that careful regard should be had to them all and their truth or falsehood tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed; and it would be an error to segregate the incidents and test their veracity in isolation. (*Jayakar*) NAND KISHWAR BUX *v.* GOPAL BUX. 188 I.C. 1=12 R.P.C. 187=6 B.R. 636=21 P.L.T. 519=52 L.W. 57=1940 O.L.R. 331=1940 P.W.N. 572=1940 O.A. 558=1940 A.W.R. (P.C.) 101=1940 M.W.N. 922=A.I.R. 1940 P.C. 93 (P.C.).

———*Appreciation—Witnesses not stating that evidence is from personal knowledge—Court, if can rely on such evidence.*

Where witnesses go into the witness-box and state broadly that there were transactions between the plaintiff and the defendant and that certain sums are owing, there is nothing in law to prevent the Court from relying upon evidence of that kind even though the witnesses do not state

that the evidence they give is from their own personal knowledge. The fact that the defendant does not cross-examine the witnesses on these matters does not assist him and indeed goes against him. (*Wort and Rowland, JJ.*) MUKHI RAM *v.* KAMTA PRASAD BALAM DAS. **161 I.C. 164 =8 R.P. 437=A.I.R. 1937 Pat. 222.**

Birth Register.

——*Birth register—Entry in—Relation of entry to particular person—Proof of.*

Where in proof of the age of a person whose age is in question an extract from the birth register is produced to the effect that a child was born to the father on a certain date, the relation of the entry in the register to the particular child of the father can only be established by other evidence. (*Varadachariar and Pandrang Rao, JJ.*) AHAMED IBRAHIM SAHIB *v.* MEYYAPPA CHETTIAR. **1939 M. W.N. 976=A.I.R. 1940 Mad. 285.**

Burden of Proof.

——*Burden of proof—Omission of party to produce best evidence—Effect.*

Parties to a suit should bring before the Court their best evidence when this is not done the Court would be justified in concluding that it would, if brought into Court, not support the case of the party omitting to produce it and in these circumstances, such party cannot be allowed to take advantage of the abstract doctrine of onus of proof. (*Tek Chand and Bhide, JJ.*) MOHAMMAD HUSSAIN *v.* SECRETARY OF STATE. **186 I.C. 45=12 R.L. 340=41 P.L.R. 895=A.I.R. 1939 Lah. 330.**

——Burden of proof—Perpetual lease by shebait—Lease not challenged but accepted by succeeding shebaits for many years—Suit by later shebait for enhancement of rent alleging occupancy tenancy—Absence of attack in plaint on *patta*—Defendants if bound to plead or prove legal necessity. *See* B. T. ACT, S. 30 (*b*). **63 C. L.J. 22.**

——*Burden of proof—Possessory suit—Plaintiff to prove subsisting title.*

When a man sues for the possession of property which is in the possession of another he must show that he has a subsisting title to the property. It is not enough for him to show that he once had a title to that property. One of the ways in which he can show that he has a subsisting title is to bring evidence to show that he once owned the property, and that at the time he was unlawfully dispossessed he was still the owner of that property. (*Mackney, J.*) MA PYAN GYI *v.* U SHEWE KYUN. **161 I.C. 833=8 R.R. 516=A.I.R. 1936 Rang. 124.**

——*Burden of proof—Question as to—Relevancy of—When both parties adduce evidence—Duty of Court.*

The doctrine of the onus of proof is merely academic where both parties give evidence. Where there is evidence on both sides, the question of onus does not arise at all, and the Judge has to determine the issue between the parties on the evidence before him. (*Wort, A.C.J.*) NATHUNI SAO *v.* LACHHMINIA. **180 I.C. 619=11 R.P. 520=5 B.R. 460=1938 P.W.N. 773=A.I.R. 1939 Pat. 108.**

——*Burden of proof—Sale in execution of decree against executor—Allegation that decree was a personal one.*

Where certain properties are sold in execution of a decree against an executor and the sale is subsequently attacked on the ground that the decrees are the personal decrees of the executor, the onus is on the person who so attacks it to prove it. This principle as to burden of proof applies to voluntary sales as well as to sales by Court and there is no reason to make a distinction. (*Thomas, C.J. and Zia-ul-Hasan, J.*) DEBI CHARAN *v.* SHEO SHANKAR. **1940 O.A. 893= 1940 O.W.N. 909=1940 A.W.R. (C.C.) 421.**

Certified copy

——*Certified copy—Proof—Deed.*

The contents of a document can be satisfactorily established by producing a certified copy. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. **I.L.R (1938) Nag. 333=176 I.C. 315=11 R.N. 41=A.I.R. 1938 Nag. 152.**

Child witness.

——*Child witness—Unsworn testimony—Admissibility—Oaths Act, S. 13.*

In the case of an unsworn testimony of a young child, that evidence is admissible. S. 13 of the Oaths Act expressly provides for cases in which the provisions of Ss. 5 and 6 of that Act have not been carried out. (*Burn and Mockett, JJ.*) DASI VIRAYA *v.* EMPEROR. **175 I.C. 422=10 R. M. 775=39 Cr.L J. 585=47 L.W. 161=1938 M.W.N. 90=1938 M.Cr.C. 39=A.I.R. 1938 Mad. 490=(1938) 1 M.L.J. 289.**

Circumstantial evidence.

—— Circumstantial evidence—Foot-print expert —Evidence of—Nature of—Evidentiary value. *See* EVIDENCE ACT, S. 45. **46 L.W. 477=A.I.R. 1937 Mad. 951.**

Commission evidence.

——*Commission evidence—Not formally tendered—If ground for rejection.*

Where evidence has been taken on commission the fact that it has not been formally tendered cannot be a ground for rejecting it from being taken in evidence. (*Macpherson and Mahomed Noor, JJ.*) RAGHUNATH RAI RAMBILAS *v.* SURAJMAL NAGARMAL. **160 I.C. 353=8 R.P. 359=A.I.R. 1936 Pat. 6.**

——*Commission evidence—Expunging portions of—Powers of Court.*

It is possible that scandalous and indecent matter might be expunged by the trial Court from the evidence recorded on commission. If it proves to be irrelevant then the matter should be noted in the judgment in the case. But once evidence has been recorded on commission it must remain as such on the record. If it is irrelevant or inadmissible, it will not aid in the determination of the case and should be neglected. (*Davies.*) CHOGA LAL *v.* BHANWAR LAL MATHUR. **1940 A.M.L.J. 4.**

Confession.

——*Confession—Retracted confession—Corroboration—Repetition of confession in committing Magistrate's Court—If sufficient corroboration—Conviction—If can be based on such confession.*

The mere repetition in the committing Magistrate's Court of a confession made by the accused in proceedings under Ch. XVIII of the Cr. P. Code Regulation cannot be said to be a sufficient corroboration of the confession, so as to make a retracted confession admissible in evidence, or to

base a conviction on the same. (*Reilly, C.J. and Nageswara Iyer, J.*) OBALAPPA *v.* GOVERNMENT OF MYSORE. **42 Mys.H.C.R. 497=15 Mys.L.J. 378.**

———*Confession — Voluntary character of—Magistrate not assuring accused that he is in free atmosphere of Court—Answer elicited by question put by Magistrate—Effect of.*

A Magistrate recording a confession of an accused person should make it clear to the accused that he is in the free atmosphere of a Court. Failure to do so detracts from the voluntary character of the confession. Where the police already know most of the facts recorded in the confession before it is recorded, that circumstance takes away the force of the confessional statement. Where after the confession has been recorded, the accused is again taken back to police custody, it is unsafe to act upon the confession. Further, if the Magistrate himself puts a question and elicits an answer from the confessing accused, that any rate cannot be considered to be voluntary. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* **17 Mys.L.J. 238.**

Credibility.

———*Credibility—Conviction involving no moral obliquity—If sufficient to discredit witness.*

A witness may be discredited because he has been convicted for one of two reasons (1) because the offence that he has committed shows a certain amount of moral obliquity; or (2) because it has resulted in the witness having spent some time in jail in company with men, presumably of bad character, which association may very possibly have contaminated him. But convictions under the Motor Vehicles Act as a rule are petty in nature resulting in fines only, as offences are not such as suggest that the offender is untruthful or of a depraved character. A conviction for adultery in this country is very much the same as appearing as a respondent or co-respondent in the Divorce Court in England, and that is not generally regarded as carrying with it the suggestion that the man is unreliable as a witness with regard to matters entirely unconnected with that particular matrimonial offence. (*Roberts, C.J. and Baguley, J.*) GAFOOR *v.* EMPEROR. **164 I.C. 677=9 R.R. 125=37 Cr.L.J. 992=1936 Cr.C. 775=A.I.R. 1936 Rang. 373.**

———*Credibility—Witnesses giving false evidence upon other branches of the case—Whether can be relied on.*

It is not open to a party to contend that any Court of Law can place reliance upon the oath of people who have admittedly given false evidence upon the other branches of the case. (*Sir George Rankin.*) CHAUHARJA SINGH *v.* BHUNESHWARI PRASAD PAL. **8 R.P.C. 219=161 I.C. 881=1936 O.L.R. 224=1936 A.L.R. 410=2 B.R. 443(P.C.).**

Criminal trial.

———*Criminal trial—Disallowance of questions—Ruling as to—Duty to record.*

It is most desirable that when a question is disallowed by a formal ruling and an advocate desires that a note of the ruling should be recorded in the proceedings, this should be done; as the question whether evidence material to one side was improperly excluded may often engage the attention of an appellate Court. Unless the appellate Court knows the exact question which

was disallowed, or the application which was refused, it is difficult to judge afterwards as to the propriety with which evidence may have been excluded from the consideration of a Court of first instance. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 347=40 Cr.L.J. 265=A.I.R. 1938 Rang. 442.**

———Criminal trial—Special rules of evidence. *See* CR. P. CODE, SS. 509 TO 512.

Cross-examination.

———*Cross-examination — Criminal trial—Disclosure of materials for cross-examination—Stage.*

It is not till the evidence-in-chief of a witness is given that a pleader or advocate can decide what material he will use for cross-examination, and it follows that he is by no means bound to declare the names of the witnesses whose statements to the police he intends to use in cross-examination beforehand, but that on the other hand he exercises an undoubted right when he makes his application in respect of each separate witness as the need arises. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 347=40 Cr.L.J. 265=A.I.R. 1938 Rang 442.**

———*Cross-examination—Fresh matter introduced in re-examination—Court giving only three minutes for cross-examination—Time given if sufficient.*

A witness was cross-examined and re-examined. In re examination fresh matter was introduced. The Counsel asked for cross-examination of the witness again. The Court granted only three minutes.

Held, the object of re-examination was to clear ambiguities in cross-examination and that if new and important matter was allowed to be introduced in re-examination, the other party has a right to cross-examine the witness as regards the matters introduced. Therefore the time of three minutes given for cross-examination was insufficient. (*Iqbal Ahmad, J.*) SALAG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=1936 A.W.R. 967=1937 A.L.R. 201=38 Cr.L.J. 416 (2)=A.I.R. 1937 All. 171.**

———*Cross-examination—Interruption and undue interference in—Duty of Court to avoid.*

While it is the duty of every Court to keep the cross-examination of a witness within legitimate bounds, it must be careful in the discharge of that duty, to avoid too much interruption and undue interference, the result of which would be to rob the cross-examination of its efficacy. (*Iqbal Ahmad, J.*) SALAG RAM *v.* EMPEROR. **167 I.C. 515=9 R.A. 550=38 Cr.L.J. 416(2)=1936 A.W.R. 967=1937 A.L.R. 201=A.I.R. 1937 All. 171.**

———*Cross-examination—Right of—Extent and limits.*

A Judge is and always must be in control of the proceedings in his Court. On the one hand the right of cross-examination must be carefully guarded and it must be remembered that it may be necessary for an advocate to approach delicately and with caution the point upon which he is seeking to obtain admissions. Hence considerable latitude is desirable since the admissions sought to be elicited may only be forthcoming when the witness, if he is concealing something, is thrown off his guard; on the other hand the length of cross-examination is by no means the

criterion of its excellence. When irrelevant topics are pursued at great length, and persistence is shown in going over the same ground again and again in the hope of making the witness appear discrepant, some limit must be placed upon the latitude given. Continued irrelevancies and repetitions are not to be endured indefinitely. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **179 I.C. 783=11 R.R. 347=40 Cr.L.J. 265 =A.I.R. 1938 Rang. 442.**

——*Cross-examination of same witness on behalf of different parties—Damaging statement against one party who had already cross-examined —Right of that party to cross-examine that witness again.*

Where the same witness is cross examined on behalf of different parties and during the course of it he makes a statement damaging to the case of one of the parties who had already cross-examined him, then, the latter party is entitled to cross-examine the witness with reference to the statement so made. (*Rachhpal Singh and Bajpai, JJ.*) SHIAM PARTAP SINGH *v.* BAISNI MADHO KUNWAR. **189 I.C. 757=13 R.A. 119=1940 A.W.R. (H.C.) 300=A.I.R. 1940 All. 353.**

Defendant as plaintiff's witness.

——*Defendant as plaintiff's witness—Calling of —Tactics condemned.*

Where the plaintiff refrained from giving evidence on his own behalf and adopted instead the tactics of calling the defendant as a witness for the plaintiff, with the usual result that important features of his case were denied by his own witness, their Lordships condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put the defendant forward as a witness of truth. (*Sir George Rankin.*) SHATRUGAN DAS *v.* BAWA SHAM DAS. **172 I.C. 633=1938 O.L.R. 42=47 L.W. 124=1938 A.L.R. 66=4 B.R. 238=1938 A.W.R. (P.C.) 40=10 R.P.C. 152=1938 M.W.N. 614= 32 S.L.R. 308=(1938) O.W.N. 48=A.I.R. 1938 P.C. 59 (P.C.).**

——*Declaratory suit.*

In a declaratory suit, the plaintiff must rely on the strength of his own case. But the strength of the plaintiff's case must always be determined to a certain extent on the case of the defendant. If the defendant produces in Court what is plainly a false claim to the property in dispute, then if the plaintiff is able to produce any reasonable case, it should be preferred to that of the defendant. (*Davies.*) GULAB CHAND *v.* BIRMA. **1940 A.M.L.J. 36.**

Documents.

——*Documents—Admission of Private letter—Witness, if can be allowed to conceal portions from opponent.*

Although a Court has inherent powers for refusing disclosure of matters, which in the public interest should be kept secret, it has no power to allow a witness to put in a portion of a letter and to say which portions of it are to go in and which are to be concealed from his opponent. Nor is the Court empowered to hand back the letter to a party, which has once been made an exhibit in the case. (*Baguley, J.*) E. A. MORLEY *v.* EMPEROR. **164 .C. 369=9 R.R. 81=37 Cr.L.J. 927=1936 Cr.C. 631=A.I.R. 1936 Rang. 299.**

——*Documents—Party relying on documents filed in previous case—Duty to exhibit them.*

A Judge deciding a case cannot base his conclusions on documents which are on the record of a previous case but which are not placed on the record of that case. If any party wishes to rely on such documents, it is his duty to get attested copies of those documents and to get them properly exhibited in the case. (*Young, C.J. and Abdul Rashid, J.*) BRIJ NANDAN LAL *v.* MST. BHOLI. **38 P.L.R. 231.**

——*Document—Police report as to loss of—If can be relied upon.*

It would not be safe to rely on reports about loss of documents on the basis of a police report and take it for granted. It would result in police reports filling in the gap of documentary evidence. (*Mehta, J.M.*) MST. RAMRATI *v.* SHEO TAHAL TEWARI. **1939 R.D. 524=1939 A.W.R. (B.R.) 224.**

——*Documents—Proof—Objection to mode of proof—When to be raised.*

An objection relating to the mode of proof of a document must be raised when the document is sought to be put in evidence and if raised at a later stage, it does not deserve serious consideration. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. **63 Cal. 1053=163 I.C. 41=37 Cr.L.J. 775=8 R.C. 714=63 C.L.J. 232=1936 Cr.C. 532=A.I.R. 1936 Cal. 316.**

——*Duty of Court—Mistake by witness in deposition.*

Witnesses are often slow thinking and the strange atmosphere of a Court is enough to confuse them. In such a state of mind a witness could quite easily omit to notice the difference between 12 years and 12 months when his statement is rapidly interpreted to him. The mistake is therefore more than understandable, and it is for a Judge of fact to determine whether it was really a mistake or not. (*Vivian Bose, J.*) PANNALAL *v.* BHAIYALAL. **173 I.C. 680=10 R.N. 319=A.I.R. 1937 Nag 281.**

Expert evidence.

——*Expert evidence—Mode of proof—Documentary opinion of Director of Agriculture—Admissibility of.*

The evidence of experts must be given in ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—the opinion of an expert must be given orally and a report merely or certificate by him, cannot possibly be evidence. Unless he goes into the witness box and gives oral evidence, there can be no cross-examination of the expert at all. The opinion of the Director of Agriculture is certainly the opinion of an expert, but the evidence, being only documentary is clearly inadmissible. (*Beasley, C.J.*) PERUMAL MUDALIAR *v* SOUTH INDIAN RAILWAY CO., LTD. **I.L.R. (1937) Mad. 764=45 L.W. 262=171 I.C. 259=10 R.M. 334= A.I.R. 1937 Mad. 407=(1937) 1 M.L.J. 341.**

——*Expert evidence—Telephony—Evidence of experts—Admissibility and weight of.*

Telephony is a science of art and the witnesses' knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion

upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts and the expert evidence of those witnesses is entitled to very considerable weight if they hold diploma in telephony and engineering and also have great experience. (*Lobo, J.*) BACHRAJ FACTORIES, LTD. *v.* BOMBAY TELEPHONE CO., LTD. **184 I.C. 36=12 R.S. 83=A.I.R. 1939 Sind 245.**

———*Footprint expert—Opinion of—Value of—If conclusive—Duty of Court to form own opinion.*

The opinion of a footprint expert should not be taken as conclusive. The Judge must form his own opinion with regard to the identity of the footprints. It is not proper for a Judge to be guided in such matters entirely by the evidence of an expert. The expert's opinion is valuable but it must be supported by statements of facts, the accuracy or otherwise of which can be verified by the Judge. (*Burn and Stodart, JJ.*) PULLAYYA *v.* EMPEROR. **1940 M.W.N. 761=52 L.W. 198.**

Heading of deposition.

———*Heading of deposition—Entry in—Proof of religion.*

The question was whether a certain person was a Burmese Buddhist. In a certain case the person was examined as a witness and the entry in the heading of the deposition sheet showed that he was a Burmese Buddhist.

Held, that the entry being merely in the heading was of no probative effect and much importance could not be attached to such entry. (*Baguley and Sharpe, JJ.*) MA TIN *v.* MA E NYUN. **176 I.C. 242=11 R.R. 46=A.I.R. 1938 Rang. 81.**

———*-Hearsay—Report of Naib Tasildar—Admissibility,*

The report of a Naib Tahsildar which is based on the statements of unknown persons who happened to be present at the time of his inspection, is purely a hearsay evidence and is not legally admissible. (*Harper, S. M. and Sathe, J. M.*) BARU SINGH *v.* SHADI. **1940 R.D. 246 (2)=1940 A.W.R. (B.R.) 152.**

Judgments.

———*Judgments—Finding of fact in—Binding effect of.*

A finding of fact by one Court in one judgment is not binding upon another Court in another case. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PANJAL SHAH. **I.L.R. (1939) Kar. 111=178 I.C. 690=11 R S. 104=A I.R. 1938 Sind 198.**

———*Landlord and tenant—Suit for arrears of rent—Pottas executed by co-sharers to landlord after creation of tenancy—Recitals in—Admissibility against tenant.*

Pottas executed in favour of the landlord by his co-sharers after the creation of the tenancy are like third party documents, and recitals therein are not admissible in evidence as against the tenant who has already acquired his interest from the landlord prior to the execution of those pottas. (*R.C. Mitter, J.*) ALI HOSSAIN SHAIKH *v.* JONABALI MONDAL. **167 I.C. 206=9 R.C. 657 =62 C.L.J. 534=A.I.R. 1936 Cal. 770.**

———*Legitimacy — Presumption — Child born during valid marriage.*

A child born during the continuance of a valid marriage is deemed to be legitimate and it throws on any person who is interested in making out the illegitimacy the whole burden of proving it. The presumption regarding legitimacy cannot be rebutted by circumstances which only create doubts and suspicions. (*Kichlu and Wazir, JJ.*) KOTWAL GOWRI NAND *v.* GHUKU LATHA. **39 P.L.R.J. and K. 51.**

Map.

———*Map—Information contained in—Value of.*

Accuracy as to the information contained in a map must depend upon the source from which information is obtained. Where sufficient evidence as to informants who have been questioned is not forthcoming and it is not also clear how far that evidence has been tested by checking the evidence of one of the informants as against that of another, and it is admitted that corrections have been made in the map from time to time, contents of such map cannot be relied upon as authoritative. (*Lord Porter.*) NANA AKPANDJA *v.* FIZAGA EGBLOMESSE. **182 I.C. 56=11 R.P.C. 277=A.I.R. 1939 P.C. 143 (P.C.).**

Marriage.

———*Marriage — Presumption from living together as man and woman.*

A presumption of a marriage arises in a case where it is established that the parties were living together as man and woman and after the death of the man the latter was allowed by his reversioners to retain his property for a period of 41 years. (*Srivastava, C. J. and Smith, J.*) DURGA BUX SINGH *v.* SURESH BUX SINGH. **1937 O.W. N. 1221.**

———*Marriage—Validity of—Presumption from acknowledgment—Marriage not legally possible between parties.*

Where a marriage was not legally possible between the parties, an acknowledgment cannot legalize the marriage, and it cannot, therefore, raise a presumption of a valid marriage. (*King, C.J. and Zia Ul-Hasan, J.*) KEOLAPATI *v.* HARNAM SINGH. **162 I.C. 527=12 Luck. 568=8 R.O. 387 =1936 O.W.N. 619=1936 O.L.R. 271=A.I.R. 1936 Oudh 298.**

Medical certificate.

———Medical certificate—Value of. *See* WORKMAN'S COMPENSATION ACT—RULES UNDER. **A.I.R. 1937 Cal. 697.**

Misappreciation and misapprehension.

———*'Misappreciation' and 'misapprehension'—Distinction.*

Misapprehension implies a positive and demonstrable mistake or misunderstanding, whereas misappreciation of evidence is more subjective and by no means so capable of logical demonstration. (*Gruer and Niyogi, JJ.*) SHEOPRASHAD *v.* EMPEROR. **I.L.R. (1938) Nag. 442=177 I.C. 605 (2)=11 R.N. 148=39 Cr.L.J. 917=1938 N.L.J. 250=A.I.R. 1938 Nag. 394.**

Mutation proceedings.

———*Mutation proceedings—Proof—Production of Revenue Officer—Whether necessary.*

In order to prove the mutation proceedings, it is not necessary to produce the Revenue Officer, who sanctioned them, as a witness. (*Bhide, J.*) MST. ATRI *v.* RODHAL. **167 I.C. 651=9 R.L. 518 =38 P.L.R. 225=A.I.R. 1936 Lah. 864.**

EVIDENCE.

Panchayatnamas.

——Panchayat namas—Documents prepared by police for recovery of articles on information given by accused—Admissibility—If substantive evidence. *See* EVIDENCE ACT, S. 159. 1939 M. W.N. 465.

Partition entries.

——*Partition entries—Evidentiary value of—Holding of trespasser entered as non-occupancy holding in* qurra *of some co-sharers—Effect—Right of latter to sue in ejectment.*

Entries in partition, while not constituting *res judicata*, are evidence on behalf of the persons in whose favour they are. If certain co-sharers in a patti are able to get a trespasser's holding included in their *qurra* as a non-occupancy holding of over twelve years, they are entitled to the benefit of the negligence of their co-sharers in the partition, and are entitled to eject the persons in possession of such holding as non-occupancy tenants. (*Darling, S. M. and Bomford, J. M.*) BACHAI TELI *v.* RAJ NARAIN SINGH. 1938 A.W. R. (B.R.) 117=1938 R.D. 186.

——Patta—If document of title—True patta by Government—Value of. *See* MADRAS REVENUE BOARD'S STANDING ORDERS, ORDER NO. 18. (1940) 2 M.L.J. 13.

——Patwari's papers—Entry as to tenancy or sub-tenancy—Value of. *See* AGRA TEN. ACT, SS. 86 AND 92. 1936 R.D. 479.

Pedigree.

——Pedigree—Record of recent events—Statements being contradictory—Evidentiary value. *See* WAJIB-UL-ARZ. (1937) 2 M.L.J. 772 (P.C).

Pleadings.

——*Pleadings—Admissions in written statement—Admissibility as evidence against co-defendant—Rule.*

Admissions of liability made by some of several defendants in their written statement in the suit will not be evidence against the other defendants who have no opportunity of testing their veracity by cross-examining them. If the plaintiff wants to rely on such admissions he must examine the admitting defendants at the trial and makes the admissions evidence. (*Nagesvara Iyer and Venkataranga Iyengar, JJ.*) THIMMIAH *v.* GIRIAPPA. 44 Mys.H.C.R. 499=18 Mys.L.J. 186.

Presumptions.

——Presumption of fact—Discretion of trial Court in raising—Interference in appeal. *See* HINDU LAW—DEBTS. 18 Mys.L.J. 276.

——Presumption—Grant by limited owner—Legal necessity—Absence of evidence as to—Lapse of time—Presumption of legal necessity—If can be made. *See* GRANT—ANCIENT TRANSACTION. 17 Pat.L.T. 488.

——*Presumption—Innocence and honesty—Presumption as to.*

It is a principle of the administration of justice that a man is presumed to be innocent of any criminal offence until he is proved to be guilty. It is equally a principle also that a man is presumed to be honest until he is shown to be dishonest. These presumptions may, no doubt be varied in exceptional cases by legislative enactment. But until they are varied and except where they are varied, they must and do hold good. (*Reilly, C.J. and Shankaranarayana Rao, J.*) RANGARAMIAH *v.* THANGAMMA. 14 Mys.L.J. 144=41 Mys.H.C.R. 405.

EVIDENCE.

——*Presumption—Loan—Admission of receipt of money.*

When a sum of money is admitted to have been received, there is no legal presumption that it was meant to be repaid. The payment may have been made for various reasons and it is for the person who comes to Court and sues for recovery of that sum to prove that it was meant to be repaid. (*Bhide, J.*) BIHARI LAL *v.* CHANDU LAL. 41 P.L.R. 650=A.I.R. 1939 Lah. 386.

——*Presumption—Owner of house with two chabutras—Notice by Municipality to remove one—Compliance with—Subsequent removal of other without notice—Suit by owner for declaration of title—Removal of prior one in answer to notice—If ground for assuming absence of title to the other.*

Plaintiff had two *Chabutras* or platforms, one on the south side,and other on the west side of his house. On a notice issued by the Municipality to remove the one on the south, he promptly removed it. The Municipality later on, without any notice at all, proceeded to remove the other Chabutra on the west side. Plaintiff sued for a declaration that the site covered by the western Chabutra belonged to him and for damages for wrongful removal of the same.

Held, that the fact that the plaintiff removed the southern Chabutra was no ground for assuming that he was not entitled to the one on the western side. (*Stone, C.J.*) PANDURANG *v.* MUNICIPAL COMMITTEE, NAGPUR. 19 N.L.J. 285.

——*Presumption — Revenue sale — Purchaser not taking possession of land sold—Presumption that possession of old proprietor continues as before and is adverse to purchaser—If arises.*

The mere fact that a purchaser at a revenue sale held for arrears of revenue, has not taken possession of the land after the revenue sale, does not give rise to a presumption that the possession of the old proprietor continued as before and that his possession was adverse to the purchaser. If it be once shown that the lands passed by the revenue sale, there can in law be no presumption that the old proprietors remained in receipt of rent from the agricultural tenants. (*Wort and Agarwala, JJ.*) RAM RAMBIJAYA PRASAD SINGH *v.* KRISHNA MADHO. 182 I.C. 982 =12 R.P. 89=5 B.R. 864=20 P.L.T. 677=A.I.R. 1939 Pat. 364.

——*Previous judgment* inter partes—*Finding in—Value of.*

The probative value of a finding in a previous suit between the parties depends upon the nature of the finding and of the issues involved in that suit and in the subsequent suit. (*Rowland and Chatterji JJ.*) PARHLAD CHANDRA SINGH *v.* BHIM MAHATO. 19 Pat. 172=12 R.P. 411=185 I.C. 685=6 B.R. 236=1940 P.W.N. 317=21 P. L.T. 577=A.I.R. 1940 Pat. 341.

—— Probative value—Human blood found on dhoti of accused. *See* PENAL CODE, SS. 300 AND 302—EVIDENCE. A.I.R. 1936 Rang. 468.

Proof.

——*Proof—Duty of plaintiff—If can succeed merely on the defects of the defence.*

A plaintiff cannot succeed merely by the weakness of the defendant's case. He has anyhow to prove his own case. (*Marsh. S.M. and Mehta,*

J M.) ACHHAIAR *v.* SHEO PRASAD. **1939 A.L.J. (Supp.) 61=1939 A.W.R. (B.R.) 71=1939 R.D. 216.**

———*Proof—Mere summoning of record—If enough proof of contents.*

The mere summoning of a record does not constitute it a part of the evidence in the case in which it is summoned. The contents in those documents, if sought to be relied upon, must be formally proved. (*Sathe, J.M.*) WAZIR SINGH *v.* KAPOOR SINGH. **1940 R.D. 242=1940 A.W.R. (B R.) 153.**

———Proof—Service of notice—Proceedings in Court—Order sheet recording service of notice and appearance of party—Effect of. *See* C. P. CODE, S. 145, PROVISO. **40 C.W.N. 465.**

Record-of-rights.

———*Record-of-rights—Jamabandi—Entry in—Value of.*

The entries in the Jamabandis have no presumptive value, although they are relevant as corroborative evidence (*Niyogi and Subhedar, A.J.Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

———*Record-of-rights*—Khasra *explaining record-of-rights—Admissibility.*

A *khasra* which is not in conflict with the record -of-rights but is a mere explanation of it in the sense of giving greater detail, is admissible in evidence for such purpose only and no other. (*Wort, J.*) ABDUL BAQI *v.* FAKHRUL ISLAM. **1937 P.W.N 261=3 B.R. 677=170 I.C. 187=10 R. P. 89=A.I.R. 1937 Pat. 333.**

———Record-of-rights—Sarrikan paper prior to permanent settlement—Admissibility to prove variation in rent for purposes of enhancement. *See* LANDLORD AND TENANT—RENT. **A.I.R. 1936 Pat. 400.**

———*Record-of-rights—Value of.*

A record-of-rights has a presumptive evidentiary value. Under the law the entries must be presumed to be correct unless the contrary is proved by evidence. (*Mohammad Noor and Varma, JJ,*) NITAI LAL DUTTA *v.* GOBINDA BHUSHAN SEN. **161 I.C. 695=8 R.P. 469=A.I.R. 1936 Pat. 142.**

Register of Births and deaths.

———*Register of births and deaths—Entries in—Value of.*

Entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such persons unless their identity is fully proved. (*Lort Williams, J.*) HEMANTA KUMAR DAS *v.* ALIANPZ INSURANCE COMPANY. **177 I.C. 517=11 R.C. 253=A.I.R. 1938 Cal. 120.**

———*Registration Endorsement—If proof of execution.*

A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution; but it can treat it as sufficient proof thereof. (*Pollock, J.*) GANPATRAO *v.* NAGARAO. **1940 N.L.J. 437.**

Relationship.

———*Relationship — Collateral relationship — Proof required.*

No standard of special strictness is applicable to the proof of collateral relationships in India, and there is no rule that a person claiming as a collateral heir is bound to allege and prove his title through the common ancestor in all its stages. 6 Cal. 626, Expl. (*Sir George Rankin.*) LAKSHMI REDDI *v.* VENKATA REDDI. **31 S.L.R. 575=168 I.C. 881=39 P L.R. 540=18 Pat.L.T. 471=9 R.P.C. 329=46 L W. 88=3 B.R. 562=1937 O.L.R. 356=1937 P.W.N. 547=1937 A.L.R. 500=1937 O.W.N. 724=39 Bom.L.R. 1005=1937 A.W.R. 1010=1937 M.W.N. 1271=A.I.R. 1937 P.C. 201 (P.C.).**

———*Relationship — Proof of—Evidence of general reputation—Admissibility.*

The Indian Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship. (*Sir George Rankin.*) LAKSHMI REDDI *v.* VENKATA REDDI. **31 S.L.R. 575=39 P.L.R. 540=18 Pat.L.T. 471=9 R.P.C. 329=46 L.W. 88=3 B R. 562=168 I.C. 881=1937 O.L.R. 356=1937 P.W.N. 547=1937 A.L.R. 500=1937 O.W N. 724=39 Bom.L.R. 1005=1937 A.W.R. 1010=1937 M.W. N. 1271=A.I.R 1937 P.C. 201 (P.C.).**

———*Relationship—Suit by two brothers on footing that they and other members form joint family.*

Where a suit is filed by two brothers to recover land sold by their father on the footing that the family (consisting of themselves, their elder brother and father) is still a joint family, then, although this cannot in law be correct as between them on the one hand and their father and eldest brother on the other hand, it is useful evidence as to their relationship *inter se.* (*Sir George Rankin.*) CHUNI LAL *v.* UDAI PRAKASH. **183 I C. 177=1939 O.L.R. 505=43 C.W.N. 1093=1940 O.W.N. 251=1940 R.D. 99=1940 O.A. 231=1940 A.W.R. (P.C.) 56=70 C L.J. 373=5 B.R. 946=A.I.R. 1939 P.C. 200 (P.C.).**

———*Relevancy—Omission to object—Effect.*

There is a distinction between the relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Evidence Act cannot be made relevant because it is let without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, no objection as to its admissibility can be allowed at a later stage. But the omission to object to the admission of irrelevant evidence cannot possibly make it relevant. 19 All. 76, Rel. on. (*Rangi Lal, J.*) NANAK CHAND *v.* MIAN MAHOMED SHAHBAZ KHAN. **A.I.R. 1936 Lah. 114.**

Riwaj-i-am.

———*Riwaj-i-am*— Admissibility — Evidentiary value of—Rattigan's Digest—Value of. *See* CUSTOM (PUNJAB)—PROOF. **I.L.R. (1939) Kar. 475.**

Settlement records.

———*Settlement Records—Entries in—Evidentiary value of.*

Settlement entries are not to be lightly thrown over, and in doubtful circumstances should nevertheless be accepted as long as it is possible that they are correct. (*Drake Brockman, S.M. and Knox, J.M.*) RAM CHANDRA PRASAD *v.* BENI PRASAD. **1936 R.D. 173.**

Thak and revenue survey maps.

———*Thak and revenue survey maps—Value of.*

The Thakbust map which preceded the revenue

survey was intended to guide the revenue surveyor who was supposed to put in the estate boundaries to be found in the Thakbust maps. The value of the records of the Thak survey and of the revenue survey and also of the collectorate papers is not uniform. (*S K. Ghose and Patterson, JJ.*) BROJENDRA MOHAN MOITRA *v.* MAHARAJA SRISH CHANDRA NANDI. **67 C.L.J. 495.**

Tradition.

———*Tradition—Value to be given on questions of pedigree.*

Where the tradition has been ascertained with reasonable certainty, a proper value must be given to it on questions of pedigree, and it may be sufficient of itself; but the fact that a case is difficult of proof does not dispense with proper proof, and in many cases there is good reason to regard tradition as poor and treacherous material. (*Sir George Rankin.*) GANESH BAKHSH SINGH *v.* AJUDHIA BAKHSH SINGH. **31 S.L.R. 702=170 I.C. 335=1937 O.W.N. 845=1937 O.L.R. 481=1937 A.L.R. 760=3 B.R. 782=1937 A.L.J. 1022=10 R.P.C. 89=1937 A.W.R. 1049=A.I.R. 1937 P.C. 310=(1937) 2 M.L.J. 772 (P.C.).**

———*Value of—Reports and Gazetteers.*

Reports and Gazetteers are not strictly evidence of the truth of all the statements contained in them, although they may be read for what they are worth. (*Nazim Ali and Rau, JJ.*) KALI PROSONNA *v.* NAGENDRA NATH. **44 C.W.N. 873.**

———*Verbal statements—Answering questions by signs and nods—If amounts to.*

A person was convicted of murder. The victim whose throat was cut by the accused was alive for sometime and being questioned regarding the offence and the person who committed it, she answered the questions by signs, being unable to speak. She described the accused by signs and when she was asked whether that person was the accused she showed assent by a nod. The question arose whether her statement was relevant and admissible against the accused.

Held, that the statement made by the deceased constituted a verbal statement resembling the case of a dumb person and was relevant and admissible in evidence. (*Lord Roche.*) A. P. CHANDRASEKER *v.* EMPEROR. **1937 A.C. 220=166 I.C. 330=45 L.W. 78=1937 M.W.N. 169=1937 O.W.N. 218=9 R.P.C. 138=1937 A.W.R. 275=38 Cr.L.J. 281=41 C.W.N. 513=39 Bom. L.R. 359=1937 A.L.J. 420=1937 P.W.N. 231=A.I.R. 1937 P.C. 24=(1937) 1 M.L.J. 600 (P.C.).**

Witness.

———*Witness—Calling of witness to explain meaning of document—Permissibility.*

Generally speaking, it is not permissible to call a witness to explain to the Court what a document means unless such witness is an expert under the Evidence Act. It is for the Court to ascertain what the document means though, no doubt, a witness may suggest methods by which an intelligent meaning can be given to the document. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* NATHALAL VANMALI. **I.L.R. (1939) Bom. 434=184 I.C. 252=40 Cr.L.J. 891=12 R.B. 155=41 Bom.L.R. 548=A.I.R. 1939 Bom. 339.**

———*Witness—Credibility—Witness employee of party calling him—If sufficient ground for not believing him.*

The fact that the witnesses for one of parties to a suit happen to be to his employees is not a sufficient ground for not relying on their evidence, especially when none but the employees could be witnesses to the transaction in dispute. (*Varma and Manohar Lall, JJ.*) PEOPLES CO-OPERATIVE BANK, LTD., PATNA *v.* SHYAM NARAIN. **6 B.R. 767=189 I.C. 232=13 R.P. 62=A.I.R. 1940 Pat. 629.**

———*Witness—Statement of—If binds party calling witness—Right of party to cross-examine hostile witness.*

There is no general rule of law which lays down that a party is bound by the evidence of a witness whom he produces. No part of the evidence of such a witness amounts to an admission on behalf of the party calling or producing him. Nor is a party disabled under the law from saying that a witness called by him is not speaking the truth upon some particular point unless he makes a written application to say that the witness is hostile. A party in law is at liberty to cross-examine his own witness with the permission of the Court. (*Allsop, J.*) BABU RAM *v.* EMPEROR. **172 I.C. 617=10 R.A. 412=39 Cr.L.J. 152=1938 All.L.R. 6=1937 A.L.J. 1214=1937 A.W.R. 885=A.I.R. 1937 All. 754.**

———*Witness—Value of testimony—Nervousness in the box—If can affect.*

A witness's evidence should not be rejected merely because he appeared to be nervous while in the box. (*Thom, C.J. and Ganga Nath, J.*) SANTU *v.* MAIKU. **187 I.C. 747=12 R.A. 565=1940 A.W.R. (H.C.) 67=1940 A.L.J. 26=A.I.R. 1940 All. 175.**

EVIDENCE ACT (I OF 1872)—*If a complete Code.*

In questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is, as it was intended to be, a complete Code of the law of evidence in British Burma. (*Roberts, C.J. Baguley, Mosely, Ba U, Dunkley, Braund and Shaw, JJ.*) THE KING *v.* NGA MYA. **1938 Rang L.R. 190=175 I.C. 465=10 R.R. 494=39 Cr.L.J. 581=A.I.R. 1938 Rang. 177 (F.B.).**

———**S. 2**—*Effect of—Exclusion of hearsay evidence—Relaxation of rule—Evidence of family tradition—Admissibility.*

S. 2 (1) of the Evidence Act repeals the whole of the English Common Law on evidence so far as it was in force in British India before the passing of that Act. The section, in effect, prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It must be recognised, however, that the principle of exclusion adopted by the Act, should not be applied so as to exclude matters which may be essential for the ascertainment of truth. Applying this principle, evidence of family tradition founded upon information derived from deceased person cannot be characterised and placed in the category of mere hearsay evidence inadmissible under the law, when it is supported by documentary evidence of great value. The relaxation of the rule as to reception of hearsay evidence must be held to be permissible where such a course tends to the due investigation of truth, and the attainment of justice. (*Guha and Mitter,*

EVIDENCE ACT (1872), S. 3.

JJ.) SRISH CHANDRA *v.* RAKHALANANDA. 65 C.L.J 520=41 C.W.N. 1103.

——S. 3—Evidence—Confession of co-accused. *See* EVIDENCE ACT, S. 30. 38 Bom.L.R. 1122=A.I.R. 1937 Bom. 31.

——S. 3—*Proof of fact—Duty of Court.*

A Court, when it has to consider whether a fact is proved or not, must not expect evidence which cannot be produced or evidence which it is unnecessary to produce. Furthermore, a Court must consider all the evidence before it and this not merely as a number of independent bits of evidence. The whole of the evidence must be considered together and the cumulative effect of it must be weighed. (*Zia-ul-Hasan and Hamilton, JJ.*) DUKHHARAN NATH *v.* COMMERCIAL CREDIT CORPORATION LTD. 15 Luck. 191=184 I.C. 521=1939 O.L.R. 630=12 R.O. 125=1939 O.W.N. 1114=A.I.R. 1940 Oudh 35.

——Ss. 8 and 9—*Applicability —Evidence of previous acts—Admissibility.*

An accused was charged with cheating for importing goods in port Karachi by deceiving the Customs authorities. The accused before this fraud had visited another port and tried to come to an arrangement with the Customs there, with a similar object, but had failed. The evidence of this closely connected visit was sought to be adduced in the prosecution for cheating the Customs at Karachi.

Held, that the evidence was admissible under S. 8 or S. 9, Evidence Act. (*Davis, J.C. and Haveliwala, A.J.C.*) MOHANLAL BHANALAL *v.* EMPEROR. 32 S.L.R. 87=172 I.C. 374=10 R.S. 149=39 Cr.L.J. 123=A.I.R. 1937 Sind 293.

——Ss. 8 and 32—*Applicability—Statement of person not proved to be dead—Admissibility—Extent.*

A statement of a person believed but not proved to be dead is no doubt not admissible under S. 32 of the Evidence Act, but the document however is admissible under S. 8, to a limited extent, to show the conduct of the party. It however is not a direct proof of the facts contained in it. (*Kichlu and Janki Nath Wazir, JJ.*) ABDUL AZIZ *v.* STATE. 40 P.L.R., J. and K. 1.

——Ss. 8 and 32—*Complaint to police by deceased apprehending danger—Admissibility.*

Where the deceased had made a complaint to the police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, it is admissible under S. 8 of the Evidence Act, whether or not it is admissible under S. 32 (1). It is evidence of the conduct of a person, an offence against whom was the subject of the trial. (*Mc Nair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. I.L.R. (1938) 1 Cal. 290=173 I.C. 65=10 R.C. 441=39 Cr.L.J. 161=66 C.L.J. 225=42 C.W.N. 129=A.I.R. 1938 Cal. 51.

——S. 8—*Conduct—Debtor tearing accounts of creditor—Report and counter-report to police—Prosecution of debtor under Ss. 378 and 477, I.P. Code—Decree in suit by creditor against debtor and debtor's report to police—Admissibility.*

F owed money to *C* in respect of which *C* possessed certain entries in a bahi. *C* alleged that while settling the account *F* snatched the bahi from his hand, ran away and tore and destroyed the relevant entries and threw the mutilated bahi away, whereafter it was picked up by *C*. *C* made a report to the police and the next day *F* also made a report that *C* was charging him falsely with having torn out certain leaves from his bahi. *C* had also instituted a suit against *F* and his father, in which *C* obtained a decree against *F's* father but not against *F*. *F* was convicted under S. 379 and S. 477, I. P. Code.

EVIDENCE ACT (1872), S. 8.

Held, that the contents of the report made by *F* were not admissible as evidence of what actually occurred, but the fact that *F* did make a report and the general nature of his allegations were admissible as showing *F's* conduct in relation to the alleged offence.

Held, further, that the fact that civil suit was brought by *C* and the nature of the decree granted in it were not inadmissible in evidence but the proceedings and the nature of allegations made during the course of civil suit were not admissible in evidence. (*Middleton, A.J.C.*) FAZAL AHMAD *v.* EMPEROR. 161 I.C. 885=8 R. Pesh. 186=37 Cr.L.J. 603=1936 Cr.C. 218=A.I.R. 1936 Pesh. 72.

——Ss. 8 and 32 (1)—*Dying declaration in the form of signs and gestures—Deceased unable to speak—Admissibility of such declaration—Verbal statement.*

A dying declaration by a deceased person made in the form of signs and gestures in answer to questions put to him is admissible in evidence. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* MOTIRAM RAISING. I.L.R. (1937) Bom. 68=165 I.C. 422=9 R.B. 134=37 Cr.L.J. 1140=38 Bom. L.R. 818=1936 Cr.C. 917=A.I.R. 1936 Bom. 372.

——Ss. 8 and 27—*Scope.*

Cunliffe, J.—S. 8 embodies, in a statutory form, the rule of evidence that the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission of the crime. It is controlled and circumscribed by S. 27 of the Act. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. 63 Cal. 1053=163 I.C. 41=8 R.C. 714=37 Cr.L.J. 775=63 C.L.J. 232=1936 Cr.C. 532=A.I.R. 1936 Cal. 316.

——Ss. 8 and 27—*Scope—Exact spot shown and articles dug out by accused—Conduct, if relevant—Presumption of complicity.*

Where an accused gives information leading to discovery, and the exact spot where the ornaments are buried is shown and the articles dug out by him from beneath, the question is not so much whether the accused was in physical possession of the ornaments buried in the field, though as a matter of fact a person who buries treasure in a spot unknown to others is really in possession of it whether it is in a field accessible to every one or in his own house. The important point is that the circumstances and conduct of the accused point clearly to his knowledge of the exact spot where the ornaments were and in the absence of any explanation, the reasonable inference is that he put them there himself; such conduct is admissible under S. 8 and taken in conjunction with other evidence is enough to warrant a presumption of complicity in the crime. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. I.L.R (1936) Nag. 78=164 I.C. 964=37 Cr.L.J. 1047=9 R.N. 4 =1936 Cr. C. 814=A.I.R. 1936 Nag. 200.

EVIDENCE ACT (1872), S. 8.

——**Ss. 8 and 27**--*Scope--Information by accused leading to police visit and discovery of arms concealed—Conversation between accused and police at search—Admissibility.*

Where on information, contained in the confession made by an accused, a visit is made by police officers to a spot where arms are concealed and the arms are dug on the information of the accused, and at such time various conversations take place between the accused and the police, the conversations are also admissible in evidence as proof of conduct and the whole evidence cannot be excluded on the ground that it is tainted by verbal communications made by the accused to the police at the time of search, especially when the police act with complete propriety, summoning the search witnesses and conducting the search in their presence. 62 Cal, 572, Foll.; 21 Bom.L.R. 724, Dist. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. **63 Cal. 1053=163 I.C. 41=8 R.C. 714=37 Cr.L.J. 775=63 C.L.J. 232=1936 Cr.C. 532=A.I.R. 1936 Cal. 316.**

——**S. 8**—*Statement that accused had deposited* karas *belonging to deceased and offered to show Police the place—Admissibility.*

The statement that the accused had deposited two *karas* belonging to the deceased in a certain place and offered to show the Police the spot is admissible. The statement made is no more than a bare statement which could be deduced from the fact that he showed the spot, which is evidence of conduct admissible under S. 8 of the Evidence Act. (*Grille and Gruer, JJ.*) NAHRU *v.* EMPEROR. **I.L.R. (1937) Nag. 268=168 I.C. 962 =9 R.N. 281=38 Cr.L.J. 642=A.I.R. 1937 Nag. 220.**

——**S. 8, Illus. (j) and (f)**—*Accusation by woman against man for attempt to ravish—Statements by her to witnesses—Silence of accused—Relevancy.*

A woman brought an accusation against a certain man alleging that he tried to ravish her. Trial Court considered the statements made by the woman to her witnesses after the alleged attempt, narrating the story of attempt. The Court also considered that all the time the woman was accusing the man to her witnesses he kept silent and on these considerations lower Courts drew an adverse inference against the man. On revision.

Held, that the statements by the woman were not relevant as according to S. 8, Illus. (*j*) the woman should have complained whereas all that she did was to make statements.

Held, further, that the silence of the accused to be relevant should have come under Illus. (*f*) to S. 8, *i e.*, it should have been proved that the accusations made by the woman against the man were made in his presence. (*Spargo, J.*) NGA AYE MAUNG *v.* THE KING. **175 I.C. 222=39 Cr.L.J. 531 (2)=10 R.R 469=A.I.R. 1938 Rang. 127.**

——S. 9—Letting value of land— Evidence afforded by return or assessment of neighbouring premises — Admissibility— Calcutta Municipal Act, S. 127. **A.I.R. 1940 Cal. 47.**

——**S. 10**—*Applicability—Conditions.*

The words "such persons" in S. 10 refer to 'two or more persons" in the beginning of the ection, and consequently the preliminary condition for application of S. 10 is that the prosecution must show that *prima facie* the persons charged had conspired together. There need not be definite proof but at least there must be a reasonable ground to show the connexion of each of the persons implicated, and the courts must come to a *prima facie* conclusion as to who were the members of the conspiracy. (*Gruer, J.*) MAHOMED ISMAIL *v.* EMPEROR. **I.L.R (1936) Nag. 152=165 I.C. 913=9 R.N. 101=1936 Cr.C. 561=38 Cr.L.J. 106=A.I.R. 1936 Nag. 97.**

EVIDENCE ACT (1872), S. 10.

——**S. 10**—*Applicability—Past common intention—Relevancy of.*

When S. 10 refers to the common intention of the conspirators, it refers to the common intention in the future, not to the common intention in the past. (*Davis, J.C.*) PRITAM HARIOMAL *v.* EMPEROR. **I.L.R. (1939) Kar. 449=184 I.C. 145 =12 R.S. 90=40 Cr.L.J. 882=A.I.R. 1939 Sind 185.**

——**Ss. 10 and 30**—*Confession of co-accused who is dead—Admissibility.*

In a charge of conspiracy a confession made by one of the accused may be admitted in evidence against the others under S. 10 of the Evidence Act, though it is inadmissible under S. 30 owing to his death before the completion of the trial. The question whether the person who made the statement is dead or alive does not affect the application of S. 10. (*Srivastava, J.*) SATDEO *v.* EMPEROR. **11 Luck. 687=159 I.C. 919=37 Cr.L. J. 182=8 R.O. 225=1936 O.W.N. 28=1936 O. L.R. 18=1936 Cr.C. 282=A.I.R. 1936 Oudh 164.**

——**Ss. 10, 30**—*Confession of person who is dead and not brought to trial—Admissibility.*

The confession of a person who is dead and has never been brought to trial is not admissible under S. 30 as the confession of a co-accused. Nor can it be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and does not apply to a confession made after the conspiracy, and the acts done in pursuance thereof were at an end. S. 10 cannot be extended to cover the case of a confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it. (*Davis, J.C. and Lobo, J.*) DENGO KANDERO *v.* EMPEROR. **175 I.C. 99=39 Cr. L.J. 545=10 R.S. 282=A.I.R. 1938 Sind 94.**

——**S. 10**—*Document found in possession of conspirator—Admissibility—Writer of document not known.*

A document of which the writer is not known if found in the possession of a conspirator would not by itself be admissible for the purpose of proving the truth of its contents as against other accused. The fact of possession would be evidence to show that the conspirator in whose possession it was found had received and preserved it. (*Guha, Bartley and Nasim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. **169 I.C. 977 =38 Cr.L.J. 818=10 R.C. 69=A.I.R. 1937 Cal. 99 (S.B.).**

——**S. 10**—*Proof of conspiracy—Ciphers discovered at searches—Evidentiary value.*

The ciphers or cipher lists discovered at the searches, provided they are properly decoded, could not be treated as acts, words or deeds of

any particular person but the fact that they existed and that the names and addresses of a number of persons who are alleged to be parties to a conspiracy as charged are mentioned in them, the fact that they are in peculiar forms, such as is not likely to be used for any lawful purpose, taken along with other matters brought out in evidence gives rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy; and in the absence of evidence that the matters appearing from the secret documents are associated with some legitimate or lawful purpose, the ciphers are themselves material affording good reasons for inferring that the names, addresses and other matters appearing in the ciphers are connected with the furtherance of the objects of the conspiracy and as such evidence under S. 10, Evidence Act. (*Guha, Bartley and Nasim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. **169 I.C. 977=38 Cr.L.J. 818=10 R.C. 69=A.I.R. 1937 Cal. 99 (S.B.).**

——**S. 10**—*Scope—Statements of third persons or alleged conspirators—Admissibility and evidentiary value of—Corroboration —Necessity—Nature of corroborative evidence required.*

The terms of S. 10 of the Evidence Act are very wide and apply to acts done in connection with a conspiracy, and under the section an act done by third persons may in certain circumstances be treated actually as evidence of the existence of the conspiracy; as for instance when an act is done or something is said in the presence of the persons implicated. But mere statements of third parties made in the absence of the persons implicated form a class by themselves, of no probative value whatever standing alone. The section does not permit of the attaching of weight as real evidence to mere statements of this kind made in the absence of the accused persons, and independent evidence required as corroboration of such statements must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be direct or circumstantial evidence. But it must be evidence which standing alone, would be properly treated as evidence for a jury of a proved intention, so that there would be evidence for a jury, apart from the statements of the alleged fellow conspirators, incriminating the persons charged. The evidence must be proof of intention and not merely proof of a possible motive for the intention. (*James, J.*) JAGDISH DAS *v.* EMPEROR. **178 I.C. 324=11 R.P. 240=40 Cr. L.J. 27=5 B.R. 82=1938 P.W.N 403=A.I.R. 1938 Pat. 497.**

——**S. 10**—*Scope of — Statement to police by conspirator incriminating himself or others—Admissibility.*

S. 10 does not apply to incriminating statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others unless the special provisions of S. 27 let in part of a confession to a police officer. A confession by a conspirator made to a Magistrate in Court implicating other conspirators is admissible in evidence under S. 30, but statements made by a conspirator to the police are not admissible in evidence, if they are incriminating. For S. 10, Evidence Act, is not intended to remove those restrictions which the Evidence

Act and the Criminal Procedure Code place upon the admissibility of statements made to the police. S. 10, Evidence Act, does not avoid in appropriate cases the operation of either S. 25, Evidence Act or S. 162, Cr. P. Code. It makes no difference if because a man is deaf these statements are written. (*Davis, J.C.*) PRITAM HARIOMAL *v.* EMPEROR. **I.L.R. (1939) Kar. 449 =184 I.C. 145=12 R S. 90=40 Cr.L.J. 882=A. I.R. 1939 Sind 185.**

——**S. 10**—*Scope of—Conspiracy— Nature of evidence to be let in.*

S. 10 of the Evidence Act is quite comprehensive. Its provisions are much wider and the section renders admissible in cases of conspiracy such evidence which is not ordinarily admissible under the English or Indian law. The first thing for the prosecution in a case of conspiracy is to give satisfactory evidence to show a common purpose. The existence of the assent of minds which is involved in a conspiracy may be and from the secrecy of the crime, usually must be, inferred from the proof of facts and circumstances which, taken together apparently indicate that they are merely part of some complete whole. (*Rachhpal Singh, J.*) BHOLA NATH *v.* EMPEROR. **I.L.R. (1939) All. 736=184 I.C. 191 =1939 A.L.J. 785=1939 A.Cr.C. 98=12 R.A. 189=40 Cr.L.J. 856=1939 A.W.R. (H.C.) 464= A.I.R. 1939 All 567.**

——**S. 10**—*Statement by co-conspirator after completion of conspiracy—Admissibility.*

The words of S. 10 are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. Such statement is therefore inadmissible in evidence against co-conspirator. (*Lord Wright.*) MIRZA AKBAR *v.* EMPEROR. **190 I.C. 233=52 L.W. 662=1940 M.W.N. 1112= 1940 P.W.N. 809=1940 A.W.R. (P.C.) 175= 1940 A.L.J. 778=1940 O. A. 943=A.I.R. 1940 P.C. 176=(1940) 2 M.L.J. 811 (P.C.).**

——**S. 10**—*Statement by deceased in dying declaration as to conspiracy—Admissibility and value of—Corroboration.*

Where from the dying declaration made by a person, who is alleged to have been murdered, it appears that there was clearly a conspiracy wrongly to implicate a particular person, the High Court before it would rely on the evidence of witnesses who have so conspired and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose, must have some other evi-

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dence before it which would enable it to distinguish the true from the false. (*Davis, J.C. and Lobo, J.*) DENGO KANDERO *v.* EMPEROR. **175 I. C. 99=39 Cr. L. J. 545=10 R.S. 282=A.I.R. 1938 Sind 94.**

——S. 11—*'Fact'—If includes statement.*

A statement is included in the definition of "fact", and statements can, therefore, be relevant under S. 11 (1) of the Evidence Act. (*Thomas and Zia ul-Hasan, JJ.*) RAM BHAROSE *v.* RAMESHWAR PRASAD SINGH. **13 Luck 697=10 R.O. 126=171 I.C. 481=1937 O.L.R. 561=1937 O.W.N. 1058=A.I.R. 1938 Oudh 26.**

——S. 11—*Scope—If subject to S. 32.*

S. 11 of the Evidence Act must be read subject to the other provisions of the Act, and a statement not satisfying the conditions laid down in S. 32 cannot be admitted merely on the ground that, if admitted, it may probabilise or improbabilise a fact in issue or a relevant fact. (*Varadachariar and Abdur Rahman, JJ.*) SEVUGAN CHETTIAR *v.* ZAMINDAR OF SIVAGANGA. **1939 M.W.N. 841=A.I.R. 1940 Mad. 273.**

——Ss. 11, 14 and 15—*Scope—Similar acts—Admissibility in evidence.*

Except as evidence of intention, evidence of similar transactions is inadmissible in evidence under Ss. 14 and 15 of the Evidence Act. In so far as such evidence relates to the nature and character of the crime it is inadmissible under S. 11 of the Evidence Act. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* **17 Mys.L J. 238.**

——S. 11—*Statement by person that certain law governs parties—Such person neither agnate nor relative—Admissibility.*

A statement by a person that certain parties are governed by a particlar school of Hindu law is admissible in evidence under S. 11 of the Evidence Act only if he is a member of a connected family (*i.e.*) a family which had descended from the same stock from which those parties descended, and not when he is neither an agnate nor a relative of theirs. (*Mitter, J.*) SUKDEB CHARAN JANA *v.* MRITUNJOY PAL. **43 C.W.N. 395.**

——S. 12—*Defamatory statement complained of referring to bad conduct towards a woman—Truth pleaded in defence—Evidence of statement having been made by woman to several persons—Whether relevant.*

Where a defamatory statement complained of is an imputation of bad conduct towards a woman and truth is pleaded in defence of the action, the evidence that the female herself made statements to that effect to a considerable number of persons is relevant under S. 12 in order to assist the Court in assessing the damages to be awarded. (*Dunkley, J.*) MA SEIN TIN *v.* U KYAW MAUNG. **164 I.C. 385=9 R.R. 91=A.I.R. 1936 Rang. 332.**

——Ss. 13 and 32 (2)—*Applicability—Register and maps regarding land in dispute prepared by people dead or whose whereabouts not traceable—Admissibility.*

Where the people who have prepared certain registers and maps regarding the land in dispute are dead or whose whereabouts cannot be traced, those documents are admissible under S. 32 (2) together with S. 13. (*Wort, Ag.C.J. and Fazl Ali, J.*) RAJENDRA NARAYAN *v.* LALMOHAN. **164 I. C. 277=9 R.P. 101=A.I.R. 1936 Pat. 462.**

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——S. 13—*Custom of sale by ryots of houses—Copies of sale deeds—Admissibility.*

Where a custom is pleaded to prevail in a village under which the ryots are entitled to sell their houses in the village, copies of sale deeds produced to prove the instances of such a custom are admissible in evidence. (*Thom, C.J. and Ganga Nath, J.*) NARAIN SINGH *v.* NET RAM. **1940 A.W.R. (H.C.) 486=1940 A.L.J. 650.**

——Ss. 13 and 42—*Decision as to custom—Relevancy—Value.*

A judgment on a question of custom is relevant, not merely as an instance under S. 13 but also under S. 42 of the Evidence Act, as evidence of custom. But its value depends upon the nature of the inquiry and the evidence produced. (*Bhide, J.*) SHER MAHOMED *v.* JAWAHAR KHATUN. **177 I.C. 775=11 R.L. 366=40 P.L.R. 29=A.I.R. 1938 Lah. 309.**

——S. 13—*Deed not* inter partes—*Admissibility.*

Documents executed between parties who are utter strangers to a suit are not admissible in evidence in proof of the title of the party relying upon them. (*Agha Haidar, J.*) BHAGWAN DAS *v.* PARABH DIAL. **167 I.C. 704=9 R.L. 528=A.I.R. 1936 Lah. 1005.**

——S. 13—*Document by party asserting his right to property—Admissibility and value.*

A document by which a party or his predecessor-in-interest had asserted a right to deal with the property in suit is admissible in evidence. But such evidence is usually of little value and a Court should not place exaggerated importance on it, as it is little more than an admission in favour of the person making it and is in this country often manufactured for the purpose of creating evidence for use later on in a claim to ownership. (*Addison and Din Mahomed, JJ.*) MUNICIPAL COMMITTEE, BATALA *v.* WALI MAHOMED. **I.L.R. (1938) Lah. 494=181 I.C. 498=11 R.L. 860=40 P.L.R. 1054=A.I.R. 1938 Lah. 795.**

——S. 13—*Instance claiming right—Statement of boundary in plan—If amounts to.*

The Illustration to S. 13 shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan. A distinction has been drawn between a claim and a statement of claim. A plan filed in a previous suit in which certain property was not then in dispute describing the property as of the plaintiff's predecessor is not an instance in which the right in dispute was claimed and hence is not admissible in evidence. (*Skemp, J.*) KHEMAN *v.* CHHOTU. **179 I.C. 68=11 R.L. 523=40 P.L.R. 968=A.I.R. 1938 Lah. 635.**

——S. 13—*Instances* post litem—*Admissibility.*

Under S. 13 of the Evidence Act, instances "in which the right of custom is claimed, recognised or exercised", etc., must be instances prior to the suit in question. *Post litem* instances are inadmissible. (*Skemp, J.*) SHANKAR LAL *v.* KAILASH CHAND. **183 I.C. 794=12 R.L. 137=41 P.L.R. 21=A.I.R. 1939 Lah. 105.**

——S. 13—*Judgment in previous suit—Findings of fact and reasons—If relevant.*

Judgment in a previous suit may be relevant under S. 13, Evidence Act, for establishing a particular transaction, but the findings of facts and reasons upon which the judgment is founded

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are no part of the transaction and cannot be relevant in a subsequent suit. A.I.R. 1931 P.C. 89, Rel. on. (*Addison and Din Mohammad, JJ.*) INAYAT ULLAH KHAN *v.* KANSHI RAM. **174 I.C. 722=10 R.L. 596=A.I.R. 1937 Lah. 437.**

——S. 13—*Judgment not* inter partes—*Admissibility and value.*

A judgment not *inter partes*, together with the plaint which preceded it and the steps in execution which followed, are admissible as evidence of an assertion of right, but cannot alter the burden of proof as between rival claimants. (*Sir George Rankin.*) KESHO PRASAD SINGH *v.* BAHURIA. **16 Pat. 258=18 Pat.L.T. 257=1937 O.W.N. 396=1937 R.D. 178=9 R.P.C. 199=1937 A.W.R. 459=41 C.W.N. 577=45 L.W. 580=1937 P.W.N. 290=167 I.C. 329=1937 O.L.R. 151=31 S.L.R. 242=1937 A.L.J. 638=65 C.L.J. 241=1937 M.W.N. 593=1937 A.L.R. 252=39 Bom.L.R. 731=3 B.R. 368=A.I.R. 1937 P.C. 69 =(1937) 2 M.L.J. 631 (P.C.).**

——S. 13—*Judgment not* inter partes—*Admissibility.*

A judgment not *inter partes* is admissible in evidence under S. 13 of the Evidence Act as evidence of a transaction in which certain rights were previously claimed. (*Jack, J.*) KUMUD BEHARI BASU *v.* HIMANGSHU KUMAR. **173 I.C. 498=10 R.C. 531=65 C.L.J. 333=A.I.R. 1937 Cal. 373.**

——S. 13—*Judgment not* inter partes—*Admissibility.*

A judgment in a previous suit may be relevant under S. 13 of the Evidence Act for establishing a particular transaction, but the findings of fact and reasons upon which the judgment is founded are no part of the transaction and cannot be relevant in a subsequent suit. A.I.R. 1937 Lah. 437, Ref. to. (*Abdul Rashid, J.*) MAHOMED SULEMAN *v.* BADRUDDIN. **42 P.L.R. 247=A.I.R. 1940 Lah. 309.**

——Ss. 13 and 43—*Judgment not* inter partes—*Finding in and reasons for decision—Relevancy of.*

Although a judgment in a previous case not *inter partes* may be admissible under the provisions of Ss. 13 and 43 of the Evidence Act, as establishing a particular transaction, that is, the decision arrived at, the reasons upon which the judgment was founded are no part of the transaction and cannot be considered, nor can any finding of fact there come to, other than the transaction itself, be relevant evidence. (*Wadia and Norman, JJ.*) SANVEERANGOUDA *v.* BASANGOUDA. **184 I.C. 337=12 R.B. 161=41 Bom.L.R. 561=A.I.R. 1939 Bom. 313.**

——S. 13—*Judgment not* inter partes—*Value of.*

In a suit between two parties a prior judgment recognising the right of one of them to the property which is the subject-matter of the suit may not have a binding effect against the other who was not a party to the judgment, but it is undoubtedly of great evidentiary value under S. 13 of the Evidence Act. (*Zia-ul-Hasan, J.*) GULAI *v.* SRIPAL. **12 Luck. 155=162 I.C. 334=8 R.O. 363=1936 R.D. 172=1936 O.W.N. 375=1936 O.L.R. 241.**

——S. 13—*Judgment recognising custom—Relevancy and value.*

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It is doubtful whether a judgment recognizing a custom is relevant under S. 13 of the Evidence Act. Even if it is, it is far from having the same importance as a clear cut instance of custom recognized hy the parties themselves. (*Addison and Abdur Rashid, JJ.*) DEWAN SINGH *v.* MST. SANTI. **17 Lah. 809=167 I.C. 39=9 R.L. 438=39 P.L.R. 148=A.I.R. 1937 Lah. 223.**

——S. 13—*Judicial decisions—Value—Considerations.*

S. 13 of the Evidence Act makes admissible particular instances in which the custom is claimed recognized or exercised. Ordinarily and in the absence of special circumstances, a judicial decision in recognition or denial of a custom is good evidence in proof thereof. There may be cases in which the judicial decision relating to a custom may not be of great value; but where it is arrived at in a well-contested case in which there is no reason to suppose that the parties could not, or did not, produce all evidence available to them the value of the decree as a piece of evidence is great. (*Niamatullah and Bajpai, JJ.*) MAHADEO *v.* BALESWAR PRASAD. **1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 R.D. 493=186 I.C. 564=12 R.A. 415=A.I.R. 1939 All. 626.**

——Ss. 13 and 42—*Land in suit claimed to be a* takya *in prior suit—Decision in such suit—Relevancy.*

Where a right of a public nature (as that a certain land was a *takya*), was asserted by one party and denied by the other in a previous suit, the decision of the Court concerning the public nature of the land, though not *res judicata*, is an important piece of relevant evidence in view of the provisions of Ss. 13 and 42 of the Evidence Act in a subsequent suit in which a similar claim is made. (*Agha Haidar, J.*) IMAM BIBI *v.* ABDUL RAHMAN. **163 I.C. 924=9 R.L. 67=A.I.R. 1936 Lah. 929.**

——S. 13—*Map prepared in previous suit—Admissibility.*

A map prepared in a previous suit is not relevant under S. 13 of the Evidence Act in a subsequent suit, when the land in dispute in the two suits is different. (*Abdul Rashid, J.*) MAHOMAD SULEMAN *v.* BADRUDDIN. **42 P.L.R. 247=A.I.R. 1940 Lah. 309.**

——S. 13—*Mortgage of property—Admissibility in proof of title.*

An act of transfer by way of sale or mortgage in property necessarily involves the assertion that the transferor owns the interest transferred. It is, therefore, a transaction by which the right is claimed or asserted and consequently a mortgage of the property in dispute by the predecessor-in-interest of the plaintiff is admissible in proof of his title. (*Tek Chand, J.*) IHSAN ALI *v.* ATTA ULLAH. **172 I.C. 769=10 R.L. 367=39 P.L.R. 389=A.I.R. 1937 Lah. 688.**

——S. 13—*Orders under S. 145, Cr.P.Code—Judgment relating to—Admissibility.*

Orders under S. 145 relate essentially to the possession of land and partake something of the nature of *interim* proceedings in a Civil Court; and the order itself partakes something of the nature of a decree, so that a judgment which relates to such orders is not necessarily to be

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applied without some modification to ordinary criminal proceedings for offences leading to a conviction or an acquittal. (*Davis, J.C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **I.L.R. (1939) Kar. 18=176 I.C. 549=11 R. S. 22=A.I.R. 1938 Sind 132.**

———**S. 13**—*Permanent lease — Proof—Documents of sub-leases—Admissibility.*

Documents of transfers and sub-leases dating from 1879, in all of which there is an assertion that the lease is permanent, is admissible in evidence under S. 13 of the Evidence Act for the purpose of proving that the lease is permanent. The assertion of a right to transfer necessarily implies the existence of a permanent lease. (*Henderson, J.*) SUKUMAR CHANDRA MUKHERJEE v. NAGENDRABALA DASI. **71 C.L.J. 209 =A.I.R. 1940 Cal. 393.**

———**S. 13**—Post litem *judgments—Admissibility.*

Judgments subsequent to the suit in which they are relied on as evidencing the particular transaction or instances in dispute are not admissible in evidence. (*Skemp, J.*) DASONDHI *v.* MILKHI RAM. **181 I.C. 703=12 R.L. 878= 41 P.L.R. 670=A.I.R. 1939 Lah. 152.**

———**S. 13**—*Prior proceedings on the question of existence of right to office or property—Relevancy as transaction by which right was recognised—Practice—Official records—Late production—Propriety of rejection—Karnam—Office of —If hereditary or family right—Ownership of inam land attached to the office and enfranchised in his or her favour—Nature of.*

The karnam occupies his office not by hereditary or family right but as a personal appointee and where lands have been enfranchised to the holders of the office, his representatives and assigns, the lands are his absolute and separate property and his alienee gets a good title. (1921) 48 I.A. 244=41 M.L.J. 1=44 Mad. 643 (P. C.), Rel. (1928) 55 M.L.J. 579=52 Mad. 6 and (1922) 43 M.L.J. 153, Ref. A reversioner of a deceased holder of an office of karnam claimed certain properties from alienees and the defence was that the properties were enfranchised mirasi service inam lands and the alienations were valid as the holder was entitled to deal with them as absolute owner as they had been enfranchised in favour of the holder of the office of the karnam. One of the defendants, an alienee, was in possession of certain documents even at the earliest stage relating to prior litigation between the alienor and another (who was claiming to be entitled to the mirasi inam lands and the office jointly with the alienor) in which it was decided that the alienor was absolutely entitled to the lands. These documents were produced for the first time only at the time of the hearing of the suit.

Held, that the previous proceedings on the question of the existence of the right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issue before it, leave should not ordinarily be refused even though they are produced late. (1929) 56 I.A. 119=56 Cal. 1003 at 1011=56 M.L.J. 562 (P.C.), Ref.

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(*Mockett and Krishnaswami Ayyangar, JJ.*) SITHANNA *v.* LAKSHMINARASIMHULU. **51 L.W. 339=A.I.R. 1940 Mad. 540=(1940) 1 M.L. J. 302.**

———**S. 13**—*Proof of custom—Judgment not produced—Judge's recital about it—Admissibility.*

In order to prove the existence or non-existence of a particular custom it is only judgment that can be produced as an instance. But if such judgment is not produced a Judge's recitals about such judgment cannot be relied on. (*Skemp, J.*) DASONDHI *v.* MILKHI RAM. **181 I.C. 703=12 R.L. 878=41 P.L.R. 670=A. I.R. 1939 Lah. 152.**

———**S. 13**—*Recital in decree—Admissibility.*

A recital in a decree is admissible as assertion of a right claimed by a party under S. 13 of the Evidence Act. (*Patterson, J.*) KAMESHWAR SINGH *v.* HRIDOY NATH SAHOO. **182 I.C. 413=12 R.C. 62=67 C.L.J. 111=A.I.R. 1938 Cal. 763.**

———**S. 13**—*Recital in document between third parties—Admissibility.*

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land in dispute lying on the boundaries of lands belonging to the executant of the document is not relevant to prove title to the land in dispute. A.I.R. 1925 Cal. 1034; A.I.R. 1926 Cal. 479 and 224 P.L.R. 1913, Foll. (*Rangi Lal, J.*) NANAK CHAND *v.* MIAN MAHOMED SHAHBAZ KHAN. **A.I.R. 1936 Lah. 114.**

———**S. 13**—*Recitals in documents of transfer —Admissibility.*

An act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is therefore a transaction by which such a right is claimed or asserted. Hence recitals in the documents of such transfer are admissible in evidence under S. 13, though assertions in those documents may be in favour of the person relying upon them. The more recent the transaction, the less value to be attached to it. A.I.R. 1937 Lah. 688, Rel. on. (*Skemp, J.*) LACHHMI NARAIN *v.* MANAK CHAND. **179 I.C. 762=11 R.L. 628=A.I.R. 1938 Lah. 846.**

———**Ss. 13 and 35**—Register of information of pargana watandars—Admissibility to prove date of grant of watan lands—If public document. *See* EVIDENCE ACT, S. 74. **39 Bom. L.R. 288.**

———**S. 13**—*Sale certificate—Admissibility.*

A sale certificate is admissible in evidence under S. 13 of the Evidence Act has a transaction by which the right to possession of certain plot of land as constituting the tenancy-lands was recognised. (*Akram, J.*) BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSE. **71 C.L.J. 504=A.I.R. 1940 Cal. 539.**

———**S. 13**—*Scope—Judgment not* inter partes *—Admissibility.*

S. 13 of the Evidence Act is nothing more than a declaration of the common rule of evidence in England, but it has been given wider construction in this country and it is not confined, as it is confined in England, to the proof

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of incorporeal rights. But although that be the case in India, its application cannot be extended to allow judgments to be used in evidence in cases which are definitely excluded by Ss. 40 to 44 of the Evidence Act. Where, therefore, what the plaintiff in a suit seeks to establish through a judgment is not a right or custom but a fact—a fact which was presumably proved in a previous action to which the defendant in the suit was not a party, the case comes neither under Ss. 40 to 44 nor under S. 13 of the Evidence Act, and the judgment not *inter partes* is not admissible in evidence. (*Wort, J.*) RAGHUPAT TEWARI *v.* NARBADESWAR PRASAD TEWARI. **166 I.C. 664=9 R.P. 330=3 B.R. 206=A.I.R. 1938 Pat. 103.**

———**S. 13**—*Scope and effect of—Findings of fact in previous suit—Admissibility.*

The purpose of S. 13 is to enable a right which may be constituted by a number of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13 for the purpose of ascertaining the parties to the dispute and the contentions of the parties, the subject of the dispute, and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. Thus, though a judgment in other proceedings even though not *inter partes* is admissible in evidence as what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of S. 13, its admissibility is subject also to other provisions of the Evidence Act, and is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before one Court in one case evidence of that fact in another case. (*Davis, J.C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **I.L.R. (1939) Kar. 18=176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.**

———**S. 13**—*Statement as to tenancy right in village by Kulkarni—Admissibility.*

A statement of a Kulkarni of a village as to the existence of a tenancy right in the village is admissible in evidence under S. 13. (*Sir George Rankin.*) SHANKARRAO *v.* SAMBHU NATHU. **190 I.C. 342=A.I.R. 1940 P.C. 192 (P.C.).**

———**S. 13**—"*Transaction*"—*Document relating to property adjacent to suit land—Description as being situate in particular village—Admissibility.*

Although a document dealing with lands adjacent to the property in dispute may sometimes be admissible under S. 13 of the Evidence Act as a transaction in so far as it evidences an assertion or recognition or denial of the right contained therein, the description in such document that the property is situate in a particular village is not part of what is made admissible under S. 13, when the right to deal with the property is not necessarily dependant upon the existence of that property within the village.

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———**Ss. 13 (a) and 35** — "*Transaction*" — "*Record*"—*Record of existing rent and assets prepared and published under Bengal Estates Partition Act—Admissibility.*

The records of existing rents and other assets of an estate, published usder S. 48 of the Bengal Estates Partition Act are records within the meaning of S. 35 of the Evidence Act, and entries in such records are admissible as relevant under Ss. 13 and 35 of the Evidence Act, although no notice may have been served under S. 50 (*c*) of the Estates Partition Act. The fact that a certain disputed land was claimed as part of an estate in the course of partition proceedings under the Estates Partition Act is a transaction under S. 13 of the Evidence Act and is therefore relevant. (*Nasim Ali and Edgley, JJ.*) CHATTERJEE ESTATES, LTD. *v.* DHIRENDRA NATH ROY. **40 C.W.N. 821.**

———**Ss. 13 and 32 (3)**—*Will conferring life-estate on widow—Probate proceedings—Statement by widow as to necessity for mortgage by her—Admissibility in suit by mortgagee after widow's death against successor-in-interest.*

Evidence given by a widow holding a life-estate under a will in probate proceedings as to the necessity for an alienation by her by way of mortgage is not admissible in evidence against her successor-in-interest to the estate in a suit against the latter by the alienee to enforce the mortgage. (*Wort and Varma, JJ.*) MANKI KUAR *v.* HANSRAJ SINGH. **173 I.C. 983=4 B.R. 370=19 Pat. L.T. 234=10 R.P. 467=A.I.R. 1938 Pat. 301.**

———**S. 13 (b)**—"*Asserted*" — *Meaning of—Verbal statement not amounting to and not accompanied by any act—Admissibility.*

The word "asserted" in S. 13 (*b*) of the Evidence Act includes both a statement and enforcement by Act. The evidence tendered under this section need not necessarily be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act, would also be admissible, if it amounted to a claim. (*Venkatasubba Rao and Abdur Rahman, JJ.*) RAJAH OF BOBBILI *v.* VENKATASURYANARAYANA. **186 I.C. 255=12 R.M. 605=1939 M.W.N. 325=49 L.W. 409=A.I.R. 1939 Mad. 432=(1939) 1 M.L.J. 602.**

———**S. 13 (b)**—*Construction* — "*Claimed*"—*Meaning of—Deed not* inter partes *reciting right—Admissibility.*

The word "claimed" in S. 13 (*b*) indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim. The mere assertion of a right in a document, to which the person against whom the right is asserted or claimed, is not a party, and of which he knows nothing is not to claim the right. A statement in such a document is not admissible as against a person who is not a party to the deed and against whom a right is claimed. (*Agarwala and Varma, JJ.*) JYOTI PRASAD SINGH DEO *v.* BHARATSHAH BABU. **15 Pat. 260=165 I.C. 589=9 R.P. 188=17 Pat.L.T. 507=3 B.R. 57=A.I.R. 1936 Pat. 543.**

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———**S. 13 (b)**—*Construction—"Instances in which the right was claimed, recognised or exercised".*

In a suit by a landlord for a declaration that certain land was liable to pay rent and that the defendants were tenure-holders liable to pay rent, the latter pleaded that the land was rent-free *debutter* and relied on two pattas executed by a predecessor in interest of the defendants and also a *kabuliyat* executed to them by a tenant to whom the defendants had granted certain rights. In these documents the land was described as defendants' *lakheraj debutter*; but the plaintiff was not a party to the said documents.

Held, the statements in the documents did not constitute "instances in which the right was claimed, recognised or exercised" within the meaning of S. 13 (*b*) of the Evidence Act, and were not therefore admissible in evidence to prove the rent-free character of the lands as against the landlord. A rent-free right cannot be exercised except perhaps by a refusal to pay rent. (*Agarwala and Varma, JJ.*) JYOTI PRASAD SINGH DEO *v.* BHARATSHAH BABU. **15 Pat. 260=165 I.C. 589=9 R.P. 188=17 Pat. L.T. 507=3 B.R. 57=A.I.R. 1936 Pat. 543.**

———**S. 14**—Prior speeches—Admissibility in proceedings under S. 108 (*b*), Cr.P. Code. *See* CR. P.CODE, S. 108 (*b*) AND EVIDENCE ACT, S.14. **1940 N.L.J. 31.**

———**S. 15**—*Scope—Hearsay evidence or evidence of facts discovered by investigating officer and not properly proved—Admissibility—Duty of Judge to point out points favourable to accused.*

The words of S. 15 are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved. There is also a difference between the admissibility of evidence and its cogency or weight, and it is the duty of the Judge in a sessions trial to point out to the jury the facts in favour of the accused as well as the facts against him. (*Davis, J. C. and Lobo, J.*) SHEWARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107 =41 Cr.L.J. 28=A.I.R. 1939 Sind 209.**

———**Ss. 17, 18 and 31**—*Admissions — Evidentiary value.*

Where a person who is alleged to have made an admission regarding his status in an agreement with the Government files a suit for a declaration as to his status as against others, the Government are neither a necessary nor a proper party to this question which is independent of the validity or invalidity of the agreement. As between the parties to the suit, it will be necessary to consider whether the statement in the agreement amounts to the admission claimed, and if so to consider its evidential value along with the other evidence, as S. 31, Evidence Act, expressly provides that admissions are not conclusive proof of the matters admitted. Even if it amounts to a clear admission, it will not act as a bar to the suit. (*Lord Thankerton.*) DULATSINGHJI *v.* KHACHAR MANSUR. **63 I.A. 248=60 Bom. 634=162 I.C. 17=8 R.P.C. 247=38 Bom.L.R. 690=64 C.L.J. 21=1936 O.W.N. 418=1936 O.L.R. 265=1936 All.L.**

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R. 452=A.I.R. 1936 P.C. 150=71 M.L.J. 691 (P.C.).

———**S. 17**—*Admissions—Value—Considerations.*

The value of admissions must depend upon the circumstances in which they were made, and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also a material point to be considered. If the fact admitted is one within the personal knowledge of the party admitting and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. A general allegation by an interested party as to the existence or non-existence of a custom is his conclusion of a mixed question of law and fact. (*Niamatullah and Bajpai, JJ.*) MAHADEO *v.* BALESHWAR PRASAD. **1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 R.D. 493=186 I. C. 564=12 R.A. 415=A.I.R. 1939 All. 626.**

———**Ss. 17 and 21**—*Confession—When relevant.*

Per *Biswas, J.*—What S. 21, Evidence Act, makes relevant is an admission, and while an admission includes a confession, the confession must still be an admission within the meaning of S. 17, before it can be held to be relevant under S.21. (*Patterson, Nasim Ali and Biswas, JJ.*) NITAI CHANDRA JANA *v.* EMPEROR. **170 I.C. 201=38 Cr. L.J. 852=10 R.C. 98=A.I.R. 1937 Cal. 433 (S.B.).**

———**Ss. 18 to 21**—*Admission—Statement by accused under S. 164, Cr.P.Code, or to Court admitting his presence at scene of murder at the commission of the crime—If confession—Admissibility.*

An admission of incriminating facts made by an accused person to a Magistrate under S. 164, Cr.P.Code, or a statement made to the Court during the course of the trial, admitting that he was at the scene of the crime when the murder took place, cannot be ruled out as inadmissible in evidence. It is admissible in evidence for what it is worth against the accused making it under Ss. 18 to 21 of the Evidence Act. Such a statement is not a confession. A confession must either admit in terms the offences or at any rate substantially all the facts which constitute the offence. (*Davis, J.C. and Lobo, J.*) ALLAHWARAYO *v.* EMPEROR. **I.L.R. (1939) Kar. 800=187 I.C. 576=12 R.S. 250=41 Cr. L.J. 477=A.I.R. 1940 Sind 53.**

———**S. 18**—*Recitals in sale-deed—If constitute admission by scribe—Admission made when interest of scribe and his brother were joint—If binding on representatives of both.*

Where a sale-deed executed by some of the co-sharers of the property was written by one *S* who also signed the deed for one of the executants, and the deed recited the vendors' share as 3 annas and odd,

Held, that the recital was an admission by *S* that the vendors did, in fact, own the share mentioned, and that by virtue of S. 18 of the Evidence Act the admission was binding not only on the representatives in interest of *S* but also on the representatives in interest of his brother, as the admission was made at a time when the interest of *S* and his brother were joint. (*B. N.*

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Rau, J.) BHUTNATH BANDOPADHYA *v.* JAGAT TARINI DASI. **71 C.L.J. 200.**

———**Ss. 18 and 21, Illus. (c) and (d)**—*Statement by accused admitting presence at scene of crime but otherwise exculpatory—Admissibility.*

A statement by the accused which amounts to an admission that he was present at the scene of the crime and that he was accompanying the persons who had committed the crime and which is otherwise exculpatory, fixing the sole guilt on the other man, although entirely inadmissible as against the other accused, is admissible for what it is worth, against the person making it under S. 18 of the Evidence Act, *vide* Illus. (*c*) and (*d*) to S. 21. (*Mosely and Ba U, JJ.*) NGA BA KYAING *v.* EMPEROR. **162 I.C. 6=8 R.R. 543=37 Cr.L.J. 531=1936 Cr.C. 219=A.I.R. 1936 Rang. 131.**

———**S. 20**—Applicability—Agreement to abide by statement of specified person. *See* C. P. CODE, SCH. II, PARA. 15. **1939 A.W.R. (H.C.) 7.**

———**S. 20**—*Applicability—Conditions—Dismissal of servant by master—Suit for damages by dismissed servant—Report submitted by another servant to master on the matter—Admissibility as against master.*

S. 20 contemplates the existence of three parties: first, the party who refers; secondly, the party who is referred; and thirdly, the party to whom the reference is made. The principle is that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt as his own the information furnished by the third party. These conditions cannot be said to be fulfilled where a master calls for a report from a servant, regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indicate that in doing so the master intends to regard the servant's report as conclusive on the matter. S. 20 cannot apply to such a case, and the report of the servant cannot become admissible as against the master in a suit for damages for wrongful dismissal, even if such report corroborates the version of the dismissed servant (plaintiff). (*Panckridge, J.*) M. D'CRUZA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **40 C.W.N. 865.**

———**S. 21**—*Admission—Effect of—Admission by Hindu father that house was built with son's self-acquisitions—Amount spent—Onus of proof of.*

An admission by a Hindu father that a house built by him was constructed out of the self-acquisition of one of his sons, only has the effect of relieving that son from proving that the house was built out of his self-acquisitions; but it does not relieve him from proving what the actual cost of construction was, when he claims that amount out of his father's estate. (*D. N. Mitter and Khundkar, JJ.*) AJIT NARAYAN CHATTOPADHAYA *v.* ASWATHA NARAYAN CHATTERJEE. **164 I.C. 530=9 R.C. 245=62 C.L.J. 430=40 C.W.N. 75.**

———**S. 21**—*Admission by son and mukhtar-i-am of party—Admissibility and value in subsequent proceedings.*

Where the son and mukhtar-i-am of a party makes an admission before the partition officer, it is admissible under S. 21 of the Evidence Act in proceedings for the division of joint *sir*; it would constitute a strong piece of evidence, but

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is not conclusive. It would not act as an estoppel, if it did not induce the opposite party to do any act which that party would not otherwise have done. (*Harper, S. M. and Sathe, J. M.*) KADAM SINGH *v.* PHALDAN SINGH. **1940 A.W.R. (B.R.) 138=1940 O.A. 860=1940 R.D. 364.**

———**Ss. 21 and 34**—*Admission—Admissibility on behalf of person making it—Statement in zamindary papers—If evidence on behalf of zamindar.*

Under S. 21 of the Evidence Act an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. Statements in zamindari papers which are entries in books of account regularly kept in the course of business are relevant under S. 34 of the Evidence Act. Such statements can therefore be taken into account though they may be admissions on behalf of the zamindar. (*Agarwala and Rowland, JJ.*) LALA RAJBALI LAL *v.* PARTAPPUR CO., LTD. **19 Pat. 398=1940 P.W.N. 498=A.I.R. 1940 Pat. 622.**

———**S. 21**—*Admission—Effect on burden of proof.*

It is one of the normal incidents of an admission that it shifts the burden of proof on the party making it. He is under a clear obligation to get rid of it and where it is not explained away, the Court may treat it as sufficient proof of the fact admitted. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) DEVISINGH *v.* HUKAMSINGH. **1939 Mar.L.R. 253 (Civ.).**

———**S. 21**—*Admission—Effect on burden of proof.*

When there is an admission by a party, the burden of proof shifts and it is for the party making the admission to explain it away. (*Ziaul-Hasan and Hamilton, JJ.*) DUKHHARAN NATH *v.* COMMERCIAL CREDIT CORPORATION, LTD. **15 Luck. 191=1939 O.W.N. 1114=12 R.O. 125=184 I.C. 521=1939 O.L.R. 630=A.I.R. 1940 Oudh 35.**

———**S. 21**—*Admission—Proof of—Rule as to.*

An admission may be proved as against the person who makes it or his representative in interest but it cannot be proved by or on behalf of the person who makes it or by his representative in interest. This section is the affirmance of the well-known rule that a man shall not be allowed to make evidence for himself. (*Ranjitmal and Sukhdeonarain, JJ.*) BALKISHAN *v.* MST. JAWRI. **1939 Mar.L.R. 244 (Civ.).**

———**S. 21**—*Admission—Presumption of truth of—If conclusive—Evidentiary value and binding character of.*

What a man admits to be true must reasonably be presumed to be so; an admission shifts the burden of proof on to the party who seeks to establish the contrary. An admission is not conclusive, but it may be shown to be wrong; but unless the admission is explained, it is binding on the party making it or those who claim through him. (*D. N. Mitter and Khundkar, JJ.*) AJIT NARAIN CHATTOPADHAYA *v.* ASWATHA NARAYAN CHATTERJEE. **164 I.C. 530=9 R.C. 245=62 C.L.J. 430=40 C.W.N. 75.**

———**Ss. 21 and 32 (2)**—*Applicability—Letter written by husband to wife stating that he had entered into a settlement and asking her to do acts in pursuance thereof and undertaking to exe-*

cute deed to his uncle—Admissibility on the question of existence of settlement.

First defendant wrote a letter from Hyderabad and sent it by post to his wife making reference to a settlement, and asking her to do certain acts to forward the settlement, such as by telling his uncle (plaintiff) that he would execute a mortgage deed in his favour.

Held, that the letter having been written by the first defendant in the ordinary course of business, and containing as it did not a mere self-serving statement, but an admission of liability as well as a claim, and made not as a mere assertion but as a request to his wife to do certain things for him, was admissible in evidence under S. 21 read with S. 32 (2) of the Evidence Act, on the question as to whether there was a family settlement between the first defendant and the plaintiff in the suit, especially when it was found that the most cordial relations existed between the parties. (*Horwill, J.*) RAMAMURTHI *v.* SUBBA RAO. **167 I.C. 30=9 R.M. 434=44 L.W. 681=A.I.R. 1937 Mad. 19.**

———**S. 21**—*Applicability—Report of offence to police—Report proved to be false—Trial of reporter for false charge—Statement to magistrate—Admissibility as admission.*

One *N* falsely reported to police that two persons caused death of his child. On investigation it was found that the report was false and malicious. He made a statement before a magistrate who recorded it under S. 164, Cr. P. Code. *N* therefore was convicted under S. 211, I. P. Code. It was contended for the accused that the report by accused was a confession recorded by Magistrate and as the rules under S. 164, Cr. P. Code, were not observed, it was not admissible in evidence.

Held, that the accused when making the statement was not an accused but was only a witness making a statement amounting to admission and therefore it was admissible in evidence under S. 21, Evidence Act. It was not a confession. (*Varma and Rowland, JJ.*) NANHKOO MAHTON *v.* EMPEROR. **163 I.C. 805=37 Cr.L.J. 862=9 R.P. 40=17 Pat.L.T. 472=1936 Cr.C. 558=1936 P.W.N. 276=A.I.R. 1936 Pat. 358.**

———**Ss. 21 and 145**—*Applicability—Suit on hand note—Admission of signature on blank paper—Previous affidavit of defendant filed in prior case admitting note and debt—Admissibility—If admission—Such admission if to be specifically brought to notice of defendant while under examination.*

In a suit on a hand note, the defendant merely admitted having affixed his signature and thumb impression to a blank piece of paper; the plaintiff in cross-examination of the defendant tendered an affidavit signed by the defendant and filed in previous case in which he had admitted the loan and the hand note. The defendant admitted the affidavit, but his attention was not drawn specifically to the admission in the affidavit.

Held, that S. 145 did not apply to the admission at all, as the affidavit was otherwise admissible, it was an admission going to the root of the case which was relevant under S. 21 of the Evidence Act, and its relevancy was not affected by the question of whether the defendant might or might not having given evidence consistent with

the statement contained in it. (*James and Rowland, JJ.*) RAMKESHWAR DAS *v.* BALDEO SINGH. **165 I.C. 805=17 Pat.L.T. 621=9 R.P. 213=3 B.R. 85=A.I.R. 1936 Pat. 588.**

———**Ss. 21, 24, 25**—*Relevancy of evidence—If affected by Cr. P. Code—Admission of guilt in application to Magistrate—Admissibility—Relevancy.*

Unless it is so specifically stated in the Cr. P. Code, no rule about the relevancy of evidence in the Evidence Act is affected by any provisions of the said code. The admission of guilt in an application presented to a Magistrate is admissible under S. 21 of the Evidence Act. It does not become irrelevant under S. 24 or S. 25 of the Act. (*Allsop, J.*) RAM NARESH *v.* EMPEROR. **I.L.R. (1939) All. 367=181 I.C. 646=11 R.A. 597=40 Cr.L.J. 559=1939 A.Cr.C. 36=1939 A.L.J. 107=1939 A.W.R. (H.C.) 190=A.I.R. 1939 All. 242.**

———**Ss. 21 and 145**—*Scope—Admissions—Admissibility without being put to party making it when examined—Evidentiary value.*

An admission is relevant whether or not it is put to the party making it. But it is a sound rule of practice to put all admissions to the parties making them, if they are giving evidence; the failure to do so, though it will not make the admissions irrelevant, will greatly weaken their force. (*Norman.*) BIRDHI *v.* SURAJMAL. **1936 A.M.L.J. 23.**

———**S. 21**—*Statement against interest contained in plaint filed by predecessor-in-interest of party—Proof of—Production of plaint, if sufficient.*

A statement against interest contained in a plaint filed by the predecessor in interest of a party is admissible as an admission under S. 21 of the Evidence Act. Such statement can be proved by putting in the plaint itself without calling the plaintiff, if alive, or making out circumstances which would make the statement admissible under S. 32 of the Evidence Act. (*Mukherjea, J.*) DEBPRASANNA MUKHERJI *v.* HARI KISHON. **173 I.C. 427=10 R.C. 517=41 C.W.N. 1089=A.I.R. 1937 Cal. 515.**

———**Ss. 24 and 26**—*"Accused"—Meaning of—Coroners' Act, S. 19—Statement recorded under—Admissibility at trial.*

The word "accused" in Ss. 24 and 26 of the Evidence Act includes any person who subsequently becomes accused. A person who is suspected of complicity in a murder and makes a confession before the coroner under S. 19 of the Coroners' Act, is an accused person within the meaning of Ss. 24 and 26 of the Evidence Act when he is later on charged with the murder or abetment of murder. His confession would be admissible against him and against his co-accused if the requisites of an admissible confession are present, though it may be retracted later on. (*Wadia, J.*) EMPEROR *v.* BHAGWANDAS BISESAR. **42 Bom.L.R. 938.**

———**S. 24**—*Admission of — Confession—Circumstances to be considered.*

The circumstances under which a confession is made must always be scrutinized with great care and caution, and in all cases the period of the detention of the accused in Police custody before a confession is made is always an important fact to be carefully considered. Illegal detention does

not necessarily vitiate a confession. It is a fact to be carefully considered in every case. In a case an accused was arrested in *B* on 8th October and was brought before the Chief Presidency Magistrate on the 17th. He denied that he had committed any offence and was then sent to a Magistrate at *K*. When present before such Magistrate on the 24th he did not express any wish to confess. His confession was recorded on 28th when he was taken to the Magistrate in his bungalow. The Magistrate did not ask him why he wanted to confess. The accused in his statement said that he was induced to confess by a promise that he would become a Court witness.

Held, that in the circumstances of the case the statement of the accused could be believed and the confession should be rejected as inadmissible under S. 24, Evidence Act. (*Davis, J.C.*) DHAMAN HIRANAND *v.* EMPEROR. **31 S.L.R. 494=171 I.C. 737=10 R.S. 124=39 Cr.L.J. 10=A.I.R. 1937 Sind 251.**

———S. 24—*Admission of confessions—Duty of Court.*

Before admitting confessions it is duty of the Judge to satisfy himself that there has not been any inducement of the nature described in S. 24 of the Evidence Act. If the circumstances are such as to raise a strong suspicion in his mind that the confession has been induced by threats or promises of the nature described in that section, then the confession is irrelevant. It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat. (*Henderson and Sen, JJ.*) MOHSENA KHATUN *v.* EMPEROR. **184 I.C. 222=40 Cr.L.J. 880=12 R.C. 214=43 C.W.N. 893=A.I.R. 1939 Cal. 610.**

———S. 24—*Applicability—Confession not voluntary—Proof of inducement—Admissibility of confession.*

If a confession is not voluntary in the wider sense of the term, *ex hypothesi*, the person who made it did not do so with the desire to tell the truth. This fact, in itself, introduces an element of suspicion. In such circumstances if facts are proved which suggest, that an inducement of some kind, although outside the terms of S. 24, was in fact given, the Court may well refuse to accept the confession as true. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. **63 Cal. 1053=163 I.C. 41=8 R.C. 714=37 Cr.L.J. 775=63 C.L.J. 232=1936 Cr.C. 532=A.I.R. 1936 Cal. 316.**

———Ss. 24 and 26—*Applicability—"Inducement, threat or promise"—Accused arrested by chowkidar and tied to cattle peg by both hands—Chowkidar leaving accused in custody of private person and going to police station temporarily—Accused feeling pain and requesting to be released—Person in charge releasing one hand and asking accused to speak truth—Confession by accused—Admissibility.*

The accused was arrested by a village chowkidar, and tied by both hands to a cattle peg. The chowkidar had to go to the police station and therefore left the accused in charge of a private person. The accused was feeling pain and wanted to sleep and therefore asked her custodian to release her. He then released one of her hands and asked her to speak the truth. She then made a confession.

Held, that though no inducement, threat or promise was expressly offered to the accused, the accused must in the circumstances have plainly been afraid of being tied up by both hands again; and although that would not be within the letter of S. 24 of the Evidence Act, the confession could not be regarded as voluntary, and could have little weight.

Held, further, that the chowkidar's custody was at an end when he made over the accused to the private individual, as it could only terminate either by his releasing the accused or by his handing her over to the regular police or to a Magistrate. (*Dhavle and S. C. Chatterji, JJ.*) EMPEROR *v.* MUSAMMAT JAGIA. **17 Pat. 369=174 I.C. 524=10 R.P. 531=39 Cr.L.J. 428=4 B.R. 451=1938 P.W.N. 293=19 Pat.L.T. 268=A.I.R. 1938 Pat. 308.**

———S. 24—*"Confession"—Meaning of—Statement on oath from person as witness—Subsequent user against him as accused—Propriety—Part of statement—Use of as corroboration—If justified.*

It is only when an utterance is made with an *animus confitendi* that it would become a confession; if, therefore, the declaration is made neither with an intention to confess, nor does it amount to an admission of facts from which guilt is directly deducible, the declaration would not amount to a confession. When a statement is not a confession there is no impediment in strict law to use it against the person making it in the capacity of an accused. But the practice of taking a statement on oath as from a witness and then using it at a later stage against an accused is not a commendable one. Further part of a statement cannot be used to corroborate evidence which includes that statement itself, and which is obviously in much need of corroboration. (*Grille and Gruer, JJ.*) KARU *v.* EMPEROR. **I.L.R. (1937) Nag. 524=168 I.C. 976=38 Cr.L.J. 648=9 R.N. 285=20 N.L.J. 103=A.I.R. 1937 Nag. 254.**

———S. 24—*Confession — Relevancy—Express decision by Court—If necessary.*

Under S. 24 of the Evidence Act which is a rule of exclusion, it is not necessary that there should be a decision in so many words that a confession is not irrelevant. In every case in which a confession is admitted in a criminal case, the fact that evidence of the commission is admitted is sufficient to make the confession evidence. It is open no doubt to the defence to object to the evidence of confession going in, but till such objection is raised, there is no need for the Court to pronounce a formal decision on the question of the relevancy of the confession. The actual fact of admission of the confession is sufficient for the purpose. (*Pandrang Row, J.*) NAVANITHAMMAL *v.* EMPEROR. **179 I.C. 143=11 R.M. 531=40 Cr.L.J. 170=1938 M.Cr.C. 338=1938 M.W.N. 1120=48 L.W. 777=A.I.R. 1939 Mad. 3=(1938) 2 M.L.J. 1065.**

———S. 24—*Confession—Statement in, that it was made under threat—Effect.*

Where the confession of an accused itself contains a statement that it was made under threat, it must go against the prosecution. (*Rachhpal Singh and Ismail, JJ.*) ABDUL SUBHAN *v.*

EVIDENCE ACT (1872), S. 24.

EMPEROR. 186 I.C. 192=12 R.A. 384=41 Cr. L.J. 258=1939 A.L.J. 966=1939 A.Cr.C. 182=1939 A.W.R. (H.C.) 768=A.I.R. 1940 All. 46.

———S. 24—*Confession—Value of.*

A man of sound mind and of full age who makes a statement in ordinary simple language must be bound by the language of the statement made and by its ordinary plain meaning. (*King, C.J. and Nanavutty, J.*) BABOO SINGH *v.* EMPEROR. 11 Luck. 662=159 I.C. 875=37 Cr.L.J. 163=8 R.O. 212=1936 O.W.N. 64=1936 O.L.R. 5=1936 Cr.C. 274=A.I.R. 1936 Oudh 156.

———S. 24—*Confession—Voluntary character—Test.*

Where details found in a confession came out during the examination of confessor by the police and where it was doubted that the police told the confessor that he was to make those statements before the Magistrate who was to record the confession because those statements would have the effect of supplying some gaps in the prosecution evidence, the confession is not voluntary. (*Henderson and R. C. Mitter, JJ.*) RAM SARUP SINGH *v.* EMPEROR. 167 I.C. 162=9 R.C. 652=38 Cr. L.J. 339=41 C.W.N. 183=A.I.R. 1937 Cal. 39.

———S. 24—*Confession made to Court by accused as approver in another case—If one made under influence of promise of pardon.*

Where a confession is made to a Court by an accused person, not at the request of any one acting on behalf of the prosecution, but on cross-examination in another case in which he gave evidence as an approver to whom a promise of pardon had been given, the confession cannot be taken as one made under the influence of the promise of pardon which he had received. (*Young, C. J. and Monroe, J.*) JAGAT SINGH *v.* EMPEROR. 165 I.C. 795=9 R.L. 317=38 Cr.L.J. 84.

———S. 24—*Confession to be taken as a whole.*

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. (*Young, C.J. and Sale, J.*) KALA MOHAMMAD AKBAR *v.* EMPEROR. I.L.R. (1940) Lah. 217=185 I.C. 274=12 R.L. 277=41 Cr.L.J. 150=A.I.R. 1939 Lah. 534.

———S. 24—*Confession—To be taken as a whole—Scope of rule.*

No doubt the admission of an accused is to be taken as a whole. But where there is evidence to show that any portion of the exculpatory statements is inherently improbable, the Court is at liberty to reject that portion of the statement which appears to it to be so improbable and to act only upon that part of the statement which is inculpatory. (*Addison and Din Mohammad, JJ.*) GHULAM NABI *v.* EMPEROR. 179 I.C. 237=11 R. L. 542=40 Cr.L.J. 185=40 P.L.R. 265=A.I.R. 1938 Lah. 850.

———S. 24—*Confession to be taken as whole—Scope of rule.*

In a case where there is evidence other than the confession of the accused, the Court is not bound to take the confession as a whole. If it is satisfied that a part of the confessional statement

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is false, it may reject that part and take into consideration that part of the confession which corroborates the evidence of the witnesses. (*Young, C.J. and Tek Chand, J.*) NIHAL SINGH *v.* EMPEROR. 188 I.C. 326=12 R.L. 27=41 Cr.L.J. 576 =42 P.L.R. 1=A.I.R. 1940 Lah. 157.

———S. 24—*Confession unreliable — Discovery too, if unreliable.*

Where the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable. (*Young, C.J. and Ram Lall, J.*) AKBAR BADAR DIN *v.* EMPEROR. 177 I.C. 617=40 P.L.R. 890=11 R.L. 339=39 Cr.L.J. 907 (2)=A.I.R. 1938 Lah. 594.

———S. 24—*Extra judicial confession—Confession before lambardars—Value of.*

There is reason to suspect that confessions are often wrung out of villagers by lambardars and other persons in authority by putting them to very severe examination during investigation, and there is also grave reason to suspect that in some cases something more severe than questioning may be adopted to obtain a false confession. It is the suspicion that this kind of treatment is accorded to suspects that makes Courts very loath to act upon extra judicial confessions, even where there is nothing on the record to show that the case is false. (*Young, C.J. and Monroe, J.*) SHORAN *v.* EMPEROR. 18 Lah. 794=40 P.L.R. 186.

———S. 24—*"Person in authority."*

Quaere.—Whether a person who is merely the landlord of the village and a member of the Union Board is a person in authority within the meaning of S. 24. (*Cunliffe and Henderson, JJ.*) BHAKTA BHUSAN PRAMANIK *v.* EMPEROR. 63 Cal. 1089 =162 I.C. 636=37 Cr.L.J. 676=8 R.C. 618=40 C.W.N. 668=63 C.L.J. 142=1936 Cr.C. 380= A.I.R. 1936 Cal. 227.

———S. 24—*Person in authority—President of Village Vigilance Committee—Confessional statements made to—Relevancy.*

The president of a Village Vigilance Committee is a person in authority within the meaning of S. 24 of the Evidence Act and confessional statements made by an accused to such a person are irrelevant. (*Burn and Lakshmana Rao, JJ.*) SATHALAVADAN *v.* EMPEROR. 183 I.C. 561=40 Cr.L.J. 809=12 R.M. 314=1939 M.W.N. 341= 49 L.W. 522=1939 M.Cr.C. 100=A.I.R. 1939 Mad. 515.

———S. 24—*'Person in authority'—Servant of landlord.*

Accused made confession to the servant of his landlord. The landlord was a big zamindar and his servant had considerable authority in the village.

Held, that the confession made to the servant was not admissible in evidence under S. 24, Evidence Act, because the servant was a "person in authority". (*Dalip Singh and Rangi Lal, JJ.*) MAHOMED *v.* EMPEROR. 164 I.C. 891=37 Cr.L. J. 1026=9 R.L. 177=1936 Cr.C. 250=A.I.R. 1936 Lah. 264.

———S. 24—*"Person in authority"—Zamindar and lambardar.*

A confession made to a zamindar or lambardar is not irrelevant under S. 24 of the Evidence Act when there is nothing to suggest that any inducement or promise was offered or made. They could

not possibly be described as persons in authority within the meaning of the section, as they have no authority to interfere in the matter of criminal charge. (*Allsop and Ganga Nath, JJ.*) JIWAN *v.* EMPEROR. **163 I.C. 661=9 R.A. 56=37 Cr.L.J. 852 (2)=1936 A.W.R. 409=1936 A.Cr.C. 116=1936 A.L.J. 376=1936 All.L.R. 627=1936 Cr. C. 615=A.I.R. 1936 All. 470.**

——Ss. 24 and 25—*Retracted confession—Absence of particulars suggesting free and voluntary character—Absence of corroboration—If can be made basis of conviction.*

Where the confession made by the accused but subsequently retracted, was wanting in those natural particulars, which one would ordinarily expect in a free and voluntary confession, and there was no other reliable evidence to corroborate it or connect the accused with the crime.

Held, that the confession was false and not voluntary and that it was made under police pressure and that conviction could not be sustained on such confession. (*Subhedar, A.J.C.*) MT. PARWATI *v.* EMPEROR. **163 I.C. 319=37 Cr.L.J. 821=8 R.N. 307=1936 Cr.C. 553=A.I.R. 1936 Nag. 88.**

——S. 24—*Retracted confession — Admissibility.*

A confession cannot be held inadmissible merely because it has been retracted or because of allegations as to its having been induced in the absence of evidence to support them. (*Coldstream and Bhide, JJ.*) IBRAHIM *v.* EMPEROR. **39 P.L.R. 419=168 I.C. 745=9 R.L. 669=38 Cr.L.J. 583 =A.I.R. 1937 Lah. 208.**

——S. 24—*Retracted confession—Confession by accused coming from police custody—Improper inducement—Inference.*

Although the accused making a confessional statement (which he retracted later) had admittedly come from police custody that day, he was before the Court for a considerable period and overwhelming prosecution evidence was recorded against him before his statement was taken.

Held, that no inference could be drawn that his confession was in any way improperly induced. It was more likely to have been due to the fact that he had an intelligence to see that he had been caught red-handed and that the evidence which had been given against him in his presence was overwhelming. (*Blacker, J.*) MOLAR *v.* EMPEROR. **178 I.C. 572=11 R.L. 475=40 Cr.L.J. 81=A.I.R. 1938 Lah. 731.**

——S. 24—*Retracted confession—Value of.*

Normally a confession of guilt is the most conclusive evidence which one can have. But if that confession is retracted, then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself in respect of his own actions. But an accused person cannot get rid of a statement merely by saying that he retracts it. (*Costello, Jack and M. C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 1=179 I.C. 506=11 R.C. 557=40 Cr.L.J. 199=68 C.L.J. 206=A.I.R. 1939 Cal. 65.**

——S. 24—*Retracted confession—Value of—Corroboration.*

Before any reliance is placed upon a retracted confession, it should be corroborated by other

evidence in material particulars. (*Weston.*) EMPEROR *v.* NARAIN. **1935 A.M.L.J. 123.**

——S. 24—*Scope of—Confession—Voluntary nature—Question of fact.*

The law relating to confessions is embodied in the very clear words of S. 24 of the Evidence Act. There is no room for technicalities in dealing with whether a confession is voluntary or not. It is a plain question of fact and not of law and one for the trial Judge to decide and he is of course entitled to differ from the Magistrate's view that the confession was voluntary, if he considers on the facts that it was not. If in a criminal trial, questions elicit information from an accused person that he had been advised by the police (whether strongly or otherwise is immaterial) to make a confession such a confession is not voluntary. (*Burn and Mockett, JJ.*) VENKATA NARAYANA *v.* EMPEROR. **1938 M.W.N. 24 (2)=47 L.W. 143.**

——Ss. 24 and 27—*Scope—Statement by accused after persistent questioning by police leading to discovery of fact—Admissibility.*

The accused, who was charged with murder, made a statement on a morning to the Superintendent of Police, which led to the discovery of a billhook which the accused said was the weapon used by him to kill the deceased. It was admitted that for four hours on the night before and for two hours on the morning on which he made the statement, the Superintendent of Police was questioning him.

Held, that this was a flagrant violation of the Madras Police Executive Orders, and that the statement of the accused was not a voluntary statement and could not be admitted as it was ruled out by S. 24 of the Evidence Act, although the evidence regarding the production of the billhook alone could be admitted in evidence. (*Burn and Stodart, JJ.*) PAPIAH *v.* EMPEROR. **186 I.C. 484=12 R.M. 663=41 Cr.L.J. 323=1939 M.W. N. 1134=50 L.W. 742=A.I.R. 1940 Mad. 136=(1940) 2 M.L.J. 35.**

——S. 25—*Applicability—Confession to Excise Officers.*

As S. 25 of the Evidence Act refers only to a police officer, a Court should not extend it to other classes of officers merely on grounds of similarity of functions. The restrictive provisions of S. 25 should not be applied to Excise officers. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* MARIMUTHU GOUNDAN. **47 L.W. 275=173 I.C. 448=10 R.M. 584=39 Cr.L.J. 338=(1938) M.W.N. 95=1938 M.Cr.C. 5=A.I.R. 1938 Mad. 460=(1938) 1 M.L.J. 238.**

——S. 25—*Confession—Containing admissions—Dissection to make part admissible—Permissibility.*

Although any non-confessional statement made by an accused person to the police can be proved against the accused, a statement which forms part of a whole narrative given by the accused ought not to be torn from its context. If the narrative as a whole is in the nature of a confession and inadmissible in evidence as such, the prosecution ought not to be permitted to single out of the confession stray passages containing the admissions of the accused against his own interest. The statement cannot be dissected so as to make parts of it admissible to support the prosecution. (*Grille, J.C. and Niyogi, A.J.C.*) JAMES DOWDALL

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v. EMPEROR. 31 N.L.R. (Supp.) 215=162 I.C. 430=8 R.N. 262=37 Cr.L.J. 607=1936 Cr.C. 605=A.I.R. 1936 Nag. 103.

———Ss. 25, 26 and 27—*'Confession'—Meaning of.*

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. A confession cannot be construed as a statement by an accused "suggesting the inference that he committed" the offence. (*Lord Atkin.*) NARAYANASWAMY *v.* EMPEROR. 66 I.A. 66=I.L.R. (1939) Kar. 123=1939 All.E.R. 396=43 C.W.N. 473=1939 A.W.R. (P.C.) 35=49 L.W. 349=180 I.C. 1=1939 O.W.N. 282=1939 A.Cr.C. 49=18 Pat. 234=1939 O.L.R. 134=1939 P.W.N. 205=20 Pat.L.T. 265=1939 A.L.J. 298=69 C.L.J. 273=41 P.L.R. 272=5 B.R. 449=40 Cr.L.J. 364=41 Bom.L.R. 428=11 R.P.C. 166=1939 M.W.N. 185=6 Cut.L.T. 25=1939 M.Cr.C. 114=A.I.R. 1939 P.C. 47=(1939) 1 M.L.J. 756 (P.C.).

———S. 25—Confessions—Statements by accused to C. I. D. officer—Admissibility. *See* CR. P. CODE, S. 162. 1938 M.W.N. 825.

———S. 25—*"Confession"—What is—Statement to police by accused during investigation—Admissibility.*

In a trial on a charge of murder the prosecution tendered in evidence against the accused a statement made by the accused to the investigating Sub-Inspector of Police who examined the accused after taking the accused into custody. The statement was to the effect that (1) the deceased had come to his house on the evening of a particular day; (2) that he had slept in one of the out rooms of the accused during the night; and (3) that the deceased left on the morning of the next day.

Held, that the statement was not a confession and was therefore admissible in evidence against the accused, but that so much of the statement which were admissions in his favour could not be considered for a person cannot make admission in his favour, although the same would be admissible against the accused and the accused also could tender evidence at the trial in support of that part of that statement.

Manohar Lal, J.—The test to decide whether a statement is a confession or not, is to see whether the accused states that he has done something which amounts to an offence thereby accusing himself of committing an offence. An admission of a relevant fact (not being a confession) made by the accused to police-officer is not prohibited from being used by virtue of any supposed prohibition under S. 162, Cr. P. Code. A statement, though it may turn against the accused and may be damaging to him, would not necessarily be a confession. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) NARAYANASWAMY *v.* EMPEROR. 17 Pat. 15=1938 P.W.N. 338=19 Pat.L.T. 432.

———S. 25—*Confession to Police before investigation—Admissibility.*

S. 25, Evidence Act, enacts that no confession made to a police officer shall be proved as against a person accused of any offence. S. 25 itself makes no distinction between a confession made before investigation and confession made after investigation. It is a confession to a police officer made at any time which is inadmissible. (*Young,*

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C.J. and Monroe, J.) HUSSAINA *v.* EMPEROR. 163 I.C. 80=37 Cr.L.J. 740=8 R.L. 994=38 P.L.R. 682=1936 Cr.C. 327=A.I.R. 1936 Lah. 380.

———S. 25—*'Police Officer'—Abkari Officer investigating offence against Bombay Abkari Act—If a Police Officer.*

The expression 'Police Officer' is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a Police Officer apply with equal if not greater force to an officer who is clothed with powers of a Police Officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. Hence an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a 'Police Officer' within the scope of S. 25. (*Rupchand Bilaram, Ag. J.C., Dadiba C. Mehta and Lobo, A.J.Cs.*) BACHOO KANDERO *v.* EMPEROR. 32 S.L.R. 185=172 I.C. 968=10 R.S. 188=39 Cr.L.J. 239=A.I.R. 1938 Sind 1.

———S. 25—*'Police officer'—Village chaukidar.*

A Village chaukidar appointed under Act XVI of 1873 is a police officer within the meaning of S. 25 of the Evidence Act, and a confession made to him is barred by the provisions of that section. 1934 A.L.J. 143, overruled. (*Sulaiman, C.J., Niamatullah and Collister, JJ.*) DEOKINANDAN *v.* EMPEROR. I.L.R. (1937) All. 85=165 I.C. 701=9 R.A. 305=1936 A.Cr.C. 194=1936 A.L.J. 999=1936 A.W.R. 894=1936 All.L.R. 939=38 Cr.L.J. 40=1936 Cr.C. 994=A.I.R. 1936 All. 753 (F.B.).

———S. 25—*Retracted confession—Admissibility against co-accused.*

When a confession is retracted it becomes very unsafe to use the contents of that confession against any co-accused who is undergoing a joint trial with the person who made the retracted confession as to his responsibility for the crime that he is accused of. On the other hand a Judge sitting alone after due consideration and taking into consideration all extraneous facts such as the statements made by the police officers who were originally in charge of the persons confessing, the statement of the Magistrate who took down the confession, and the general tone of the confession itself together with the probabilities to be attached to the explanatory statement retracting confession, can accept the confession as being a true and proper account of the necessary happenings to support the prosecution case before the Court. 22 Cal. 164 and *Rex* v. *Thompson,* (1893) 2 Q.B. 12, Rel. on. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. 63 Cal. 1053=163 I.C. 41=37 Cr.L.J. 775=8 R.C. 714=63 C.L.J. 232=1936 Cr.C. 532=A.I.R. 1936 Cal. 316.

———S. 25—*Scope—Investigation of one crime—Confession to Police of another crime—Admissibility.*

A confession made to the police in the course of the investigation of a crime is inadmissible in evidence, though the confession relates to another crime. The whole spirit of S. 25 of the Evidence Act is to exclude confessions to the police, and the moment a statement is found to amount to a confession, it does not matter at all of what crime

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it is a confession. (*Mockett, J.*) SESHAPANI CHETTY *v.* EMPEROR. I.L.R. (1937) Mad. 358=166 I.C. 917=9 R.M. 411=38 Cr.L.J. 323=45 L.W. 100=1936 M.W.N. 1241=1936 M. Cr. C. 411=A.I.R. 1937 Mad. 209=(1937) 1 M.L.J. 154.

——S. 26—*Accused making statement to village headman while being arrested by him, at instance of police—Use of such statement.*

Where an accused, while he is in act of being arrested by village headman, at the instance of the police, makes a statement to the headman that he has committed a murder, such statement is very near to statement made by a man when in police custody and should be scrutinized with great care. (*Roberts, C.J. and Baguley, J.*) SIT RO SAO *v.* EMPEROR. 165 I.C. 319=37 Cr.L.J. 1137=9 R.R. 204=1936 Cr.C. 851=A.I.R. 1936 Rang. 455.

——S. 26—*Applicability.*

Per *Bhide, J.*—S. 26 has always been taken to apply to confessions made to some person other than a police officer. (*Young, C.J., Tek Chand, Dalip Singh, Monroe, Bhide, Din Mohammad and Ram Lall, JJ.*) HAKAM KHUDA YAR *v.* EMPEROR. I.L.R. (1940) Lah. 242=188 I.C. 498=13 R.L. 1=41 Cr.L.J. 591=A.I.R. 1940 Lah. 129 (F.B.).

——S. 26—*Applicability—Illegal arrest by police officer—Confession by arrested person while in custody of arresting officer—Admissibility.*

S. 26 of the Evidence Act is not inapplicable in cases where the arrest by the police-officer of person making the confession is illegal. Whether the arrest is legal or illegal the mischief which the section is intended to avert remains all the same, and a confession made by the arrested person while in the custody of the police-officer is inadmissible under S. 26. The illegality of the arrest does not affect the operation of S. 26. (*Dhavle and S. C. Chatterji, JJ.*) EMPEROR *v.* MUSSAMMAT JAGIA. 17 Pat. 369=174 I.C. 524=10 R.P. 531=39 Cr.L.J. 428=4 B.R. 451=1938 P. W. N. 293=19 Pat. L. T. 268=A. I. R. 1938 Pat. 308.

——S. 26—*Applicability—Magistrate not empowered under S. 164 making inquiry under S. 176, Cr. P. Code—Confessional statement to—Admissibility.*

The words of S. 26, Evidence Act, are very wide and there is nothing in that section that limits its operations to Magistrates specially empowered under S. 164, Cr. P. Code. On a case of murder being reported to the police, a Magistrate who was not specially empowered under S. 164, Cr. P. Code, held an inquiry into the cause of the death of the deceased under S. 176, Cr. P. Code. During such inquiry the accused who was in the custody of the police, made a confessional statement to the Magistrate regarding the place where the body was buried and also as to the position in which the body would be found there. The Magistrate while holding the inquiry did not ask the accused any question that would implicate him in murder but only such question as would enable the accused to give out the place where it was buried. The body was found in precisely the same position as described by the accused. On the prosecution of the accused for murder,

Held, that such confessional statement was not controlled by S. 176, Cr. P. Code, but by S. 26, Evidence Act, and it was admissible in evidence

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under S. 26. (*Davis, J.C. and Lobo, A.J.C.*) NOUKAR MOULEDINO *v.* EMPEROR. 170 I.C. 827=31 S.L.R. 460=38 Cr.L.J. 968=10 R.S. 73=A.I.R. 1937 Sind 212.

——S. 26—*Confession—Admissibility and use of—Rule that it should be taken as a whole—Circumstances to be considered as a whole.*

Where an accused confesses to having caused the death of a woman and admits having robbed her after her death, but during that confession introduces into it circumstances with a view to excuse himself from a conviction for murder, it cannot be contended that the confession must be accepted as it is and that so taken it is not sufficient for a conviction. Such a contention is wholly unacceptable and is contrary to practice and authority. When the confession is shown to be voluntary and made with due apprehension of what was said and of the consequences, the confession must be accepted and acted upon along with other circumstances as a whole, including the other evidence in the case. (*Burn and Mockett, JJ.*) EMPEROR *v.* CHINNAYYA. 187 I.C. 481=12 R.M. 733=41 Cr.L.J. 461=1940 M.W.N. 169.

——S. 26—Confession—Statement to *daffadar* after arrest—Admissibility. *See* CR.P. CODE, S. 109. 21 Pat.L.T. 171.

——S. 26—"*Custody of a police-officer*"—*Meaning of—Police-officer arresting accused and leaving him in charge of private individual during temporary absence—Accused, if in custody of police-officer.*

The "custody" of a police-officer for purposes of S. 26, Evidence Act, is not mere physical custody. A person may be in the custody of a police-officer, though the latter may not be physically in possession of the person of the accused making the confession. Once an accused person is arrested by a police-officer and is in his custody, the mere fact that for some purpose or other the police-officer happens to be temporarily absent and during such absence leaves the accused in charge of a private individual, does not terminate the custody of the police-officer. The accused must be deemed to be still in the custody of the police-officer. (*Dhavle and S.C. Chatterji, JJ.*) EMPEROR *v.* MUSAMMAT JAGIA. 17 Pat. 369=174 I.C. 524=10 R.P. 531=39 Cr.L.J. 428=4 B.R. 451=1938 P.W.N. 293=19 Pat.L.T. 268=A.I.R. 1938 Pat. 308.

——S. 26—Extra-judicial confession—Reliance upon. *See* EVIDENCE ACT, SS. 27 AND 26. 1939 A.L.J. 732.

——S. 26—*Police-officer—Village chowkidar—If police-officer.*

A village chowkidar is a police-officer within the meaning of S. 26 of the Evidence Act, though he may not be one within the meaning of the Cr. P. Code in respect of the powers to be exercised by a police-officer for purposes of that Code. (*Dhavle and S.C. Chatterji, JJ.*) EMPEROR *v.* MUSAMMAT JAGIAH. 17 Pat. 369=174 I.C. 524=10 R.P. 531=39 Cr.L.J. 428=4 B.R. 451=1938 P.W.N. 293=19 Pat.L.T. 268=A.I.R. 1938 Pat. 308.

——S. 27—*Admissibility of statement—Conditions—"Custody"—Meaning of.*

In order that a statement under S. 27 of the

Evidence Act may be admissible, the maker of the statement should be in the custody of the police but that custody need not be a formal arrest. In the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Cr.P. Code, their presence with the police under some restraint amounts to the "custody" which is contemplated by the section. If a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible. (*Coldstream and Din Mahomed, JJ.*) ALLAH DITTA *v.* EMPEROR. **18 Lah. 106=171 I.C. 377=10 R.L. 196=40 P.L.R. 436=38 Cr.L.J. 1082=A.I.R. 1937 Lah. 620.**

———S. 27—*Admissibility—Whole of statement leading to discovery.*

If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. **I.L.R. (1936) Nag. 78=164 I.C. 964=37 Cr.L.J. 1047=9 R.N. 48=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.**

———S. 27—*Applicability—Accused not formally arrested when giving information but arrested prior to going to spot where articles were hid—If in police custody.*

Even if an accused is not formally arrested when he gives information leading to discovery, if it is proved that he was arrested before he went to the spot from which the articles are recovered, the accused shall be deemed for all practical purposes as in police custody when giving such information. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. **I.L.R. (1936) Nag. 78=164 I.C. 964=37 Cr.L.J. 1047=9 R.N. 48=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.**

———S. 27—*Applicability—"Custody of police"—Person in police custody under order of Magistrate—Statement by—Admissibility.*

S. 27 of the Evidence Act is no doubt restricted to persons in custody of police; but there is no reason why it should not apply also to persons who are in actual police custody although that custody has been ordered by a Magistrate. There is nothing in such a case to offend against the principle of S. 27, namely, that portions of a confession made to the police leading to the actual discovery of facts can safely be proved. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. **173 I.C. 418=4 B.R. 266=10 R.P. 402=39 Cr.L.J. 302=18 Pat.L.T. 964=1937 P.W.N. 1001=A.I.R. 1938 Pat. 60.**

———S. 27—*Applicability—Information leading to discovery of acts really given by person other than accused—Subsequent statement by accused and actual discovery by him—Relevancy.*

Where the discovery of facts is in consequence of information given not by the accused but by persons other than the accused, and a very slight trouble would suffice to discover those facts without any intervention whatever by the accused, anything which the accused might say in the matter is not admissible in evidence. The fact

that the actual discovery is done by the accused is immaterial so long as the real information which leads to the discovery comes from a person other than the accused. (*King and Lakshmana Rao, JJ.*) VENKADU *v.* EMPEROR. **181 I.C. 933=11 R.M. 883=49 L.W. 175=40 Cr.L.J. 606=1938 M.Cr.C. 349=1938 M.W.N. 1272=A.I.R. 1939 Mad. 266.**

———S. 27—*Applicability—"Leading to discovery"—Statement leading to discovery not immediately but ultimately—Admissibility.*

S. 27 of the Evidence Act refers to a fact being discovered; a fact means and includes, according to the definition in S. 3, "anything, state of things or relation of things capable of being perceived by the senses." The accused told the sub-Inspector of Police holding the inquest of the dead bodies of the victims that he would show the knife with which he had stabbed the victims and took the Sub-Inspector to a spot and pointed it out as the one where he had thrown the knife. But no knife was found there at the time. A third person stated that he had seen the accused throwing the knife at the spot, that he later picked it up but had it thrown it away into a bush near by fearing that he might get into trouble. The knife was ultimately recovered from the bush mentioned by the third person who was a witness for the prosecution. The accused contended that the statement of the accused was not admissible in evidence under S. 27 as no discovery was made in consequence of information received from the accused.

Held, (1) that two facts were discovered (*a*) the fact that a knife had been seen to be thrown away and was later found by the witness at the spot indicated and (*b*) the knife itself; (2) that the statement of the accused led the Sub-Inspector to the scene and the subsequent discoveries were directly in consequence of the information received from the accused; and (3) therefore the statement was admissible under S. 27. (*Mockett and Krishnaswami Ayyangar, JJ.*) RAMAMURTHY *v.* EMPEROR. **1940 M.W.N. 163.**

———S. 27—*Applicability—Mere pointing out of house of complainant by accused charged with theft—Admissibility as information or statement.*

Mere pointing out of house of a complainant by the accused charged with theft is neither an information nor a statement incriminating or otherwise admissible under S. 27, Evidence Act. (*Davis, J.C.*) DHAMAN HIRANAND *v.* EMPEROR. **31 S.L.R. 494=171 I.C. 737=10 R.S. 124=39 Cr.L.J. 10=A.I.R. 1937 Sind 251.**

———S. 27—*Applicability—Police discovering witnesses as a result of statements made by accused—Statements—Admissibility—"Fact"—Meaning of.*

Where certain witnesses for the prosecution are discovered by the police as a result of statements made to them by the accused, the statements are covered by S. 27 of the Evidence Act and are relevant and admissible. "Fact," in S. 27 means not only a thing but a state of things. (*D.R. Norman.*) RAHIM BUX *v.* EMPEROR. **1937 A.M.L.J. 18.**

———S. 27—*Applicability—Statement leading to discovery—What constitutes—Fact discovered not*

because of statement made but due to act of another—Admissibility of statement.

The appellant along with two others were charged and tried for the offence of murder. He made a statement to a police at the end of which he promised to take the police to the place where one of the other accused had buried the spear with which he had stabbed the deceased. The next day the appellant took the accused to the place, and after he had unsuccessfully searched for the spear the other accused, who was said to have buried it, took it out and produced it. Appellant's statement was admitted in full under S. 27 of the Evidence Act and he was convicted almost entirely on the basis of his statement.

Held, that the discovery of the spear was not, in the essential sense of the word, due to the information given by the appellant, but was due simply and solely to the action of the other accused who had himself hidden the spear in that particular place, and the statement did not therefore fall under S. 27 of the Evidence Act and was inadmissible in evidence. (*King and Lakshmana Rao, JJ.*) GANGANNA DHORA, *In re.* **190 I.C. 396=1940 M.W.N. 542=51 L.W. 564=A.I.R. 1940 Mad. 744=(1940) 1 M.L.J. 758.**

———**S. 27 and Cr. P. Code, S. 162**—*Confessional statements leading to discovery—Admissibility—S. 27, Evidence Act—If affected by S. 162, Cr. P. Code.*

The words of S. 162, Cr. P. Code, are wide enough to exclude a confessional statement made to a police officer in the course of investigation, irrespective of whether a discovery is made or not. But the provisions of S. 27 of the Evidence Act are quite independent of S. 162, Cr. P. Code, and the amendment of the latter in 1923 is not intended to abrogate or impair the effect of S. 27 of the Evidence Act; hence a statement excluded by S. 162 may become admissible under S. 27 of the Evidence Act. (*Niyogi and Gruer, JJ.*) MOTILAL *v.* EMPEROR. **185 I.C. 310 =12 R.N. 150=41 Cr.L.J. 158=1939 N.L.J. 585 =A.I.R. 1940 Nag. 66.**

———**S. 27**—*Confessional statement leading to discovery—Preamble having no connection with discovery—Admissibility.*

The preamble in a confessional statement which has no relation to the discovery of the facts is not admissible under S. 27 of the Evidence Act. (*Burn, J.*) VEERANA KONE *v.* EMPEROR. **184 I.C. 99=12 R.M. 410=50 L.W. 518=40 Cr.L.J. 849=1939 M.W.N. 519=1939 M.Cr.C. 187=A.I.R. 1939 Mad. 593=(1939) 2 M.L.J. 487.**

———**S. 27 and 30**—*Construction—Charge of murder against three persons—Confessional statement by one to Police—Discovery of material fact and material object—Statement—Admissibility against confessing accused—Extent of—Admissibility against co-accused.*

Three persons were charged and convicted of the murder of the father of the third accused by strangling him. It was alleged that the deceased and the third accused were quarrelling, because of the frequency of the first accused's visit to the third accused. The second accused was an associate of the first accused. The evidence for the prosecution consisted, among other things of a statement made by the first accused which was recorded by a Police Officer, two days after the alleged murder, which was in the following terms: "He said that at about 11 P.M. on the night of 26-3-1930, himself and Gurunatha Goundan (second accused) together killed Sennimalai Goundan *alias* Sottayan (deceased) by gagging his mouth with cloth, and throttling his neck with hands, and also by putting a rope and pressing it that—that night—they got two bottles of illicit arrack by paying Rs. 2 to Gandhi Ranga Royan —who got it from some other place—that a small quantity was left over in one bottle only, that (they) buried (1) the empty bottle, (2) a rope and cloth gag in a dung hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of the compound east of the choultry at *K* and that he would go and take them and produce them. This is known to us." Subsequently the Sub-Inspector of Police took the first accused together with the village Munsif to the dung-hill and the accused took a rope, a cloth and an empty bottle. After that the first accused took the Sub-Inspector to he compound of the choultry and from near a log of wood dug up and produced another empty bottle.

Held, (1) that the earlier part of the statement that the first and second accused killed the victim by gagging his mouth with a cloth and throttling his neck with hands and also by putting a rope and pressing it connected the rope and the cloth gag directly with the offence and without it they were quite unconnected. The statement was therefore admissible in evidence under S. 27, Evidence Act and the fact that the statement was a lengthy one made no difference; (2) that the statement that the bottle would be found in the dungheap, etc., was not a confession but "information" under S. 27, leading up to the discovery of a fact, which fact was made material because there was evidence that at a time material to the case the accused was in the near vicinity of the scene of murder carrying a bottle and intoxicated, which fact was wholly denied by the first accused in every respect; (3) that so much of the statement as was admissible in evidence against the first accused could be taken into consideration as against the second accused under S. 30, Evidence Act; (4) that there was nothing in S. 30 which restricted the "confession" to one recorded before a Magistrate. (*Beasley, C.J., Mockett and Horwill, JJ.*) ATHAPPA GOUNDAN, *In re.* **I.L.R. (1937) Mad. 695=46 L.W. 152=171 I.C. 245=38 Cr. L.J. 1027=10 R.M. 321=1937 M.W.N. 442 =1937 M.Cr.C. 196=A.I.R. 1937 Mad. 618= (1937) 2 M.L.J. 60 (F.B.).**

———**S. 27**—*Construction and scope.*

S. 27 is an enabling section providing an exception to the previous ones which exclude confessions made to or in presence of the police. If the conditions of the section are fulfilled, it allows a confession to be proved. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. **I.L.R. (1936) Nag. 78=164 I.C. 964=37 Cr.L.J. 1047 =9 R.N. 48=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.**

———**S. 27**—*Construction and scope—Confessional statement—Admissibility against accused—Conditions—Discovery of fact or object—Relevancy of fact and direct connection between information given by accused and fact or object dis-*

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covered—Necessity to prove—Statement—How far admissible.

Before a confessional statement made by a person accused of an offence who is in the custody of a police officer may be proved against him, two conditions must be observed, firstly that some incriminating thing must be proved to have been found as the direct result of the information supplied by the accused, and, secondly it must be confined to that portion which refers exclusively to the thing found; in other words, when any incriminating object is proved to have been found as the direct result of information given by a person accused of any offence in the custody of a police officer that portion of the information which has led to the object being found may be proved—provided it refers clearly to that object, even though the information provable is self-incriminating. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in S. 27 of the Evidence Act is a confession of the offence charged and not of any thing else. Before the statement is given in evidence, it must be shown that the fact discovered must be a relevant fact and that the object is a material object. In cases where the things discovered as a result of the accused's information are proved to be property stolen from a person and the subject of the charge or worn by the victim of a murder, just before the murder is committed, the property so discovered is directly connected with the crime and the fact thereby discovered relevant. It can be made relevant by evidence *aliunde*, or it can be made relevant by the statement of the accused himself. (*Beasley, C.J., Mockett and Horwill, JJ.*) ATHAPPA GOUNDAN, *In re.* **I.L.R. (1937) Mad. 695=46 L.W. 152=171 I.C. 245=38 Cr.L.J. 1027=10 R.M. 321=1937 M.Cr.C. 196=1937 M.W.N. 442 =A.I.R. 1937 Mad. 618=(1937) 2 M.L.J. 60 (F.B.).**

———S. 27—*"Custody"—Meaning.*

Per *Bhide and Din Mohammad, JJ.*—"Police custody," does not necessarily mean custody after formal arrest and it also includes "some form of police surveillance and restriction on the movements of the person concerned by the police." It is open to an accused person to prove in every case that arises that he was actually in the custody of a police officer, although in the police diaries he was not shown to have been formally arrested. *Young, Mohammad and Ram Lall, JJ.*) HAKAM KHUDA *Mohommad and Ram Lall, JJ.*) HAKAM KHUDA YAR *v.* EMPEROR. **I.L.R. (1940) Lah. 242=188 I.C. 498=13 R.L. 1=41 Cr.L.J. 591=A.I.R. 1940 Lah. 129 (F.B.).**

———S. 27—*If repealed by S.* 162, *Cr. P. Code.*

Per *Young, C.J., Tek Chand, Din Mahammad, Monroe and Ram Lall, JJ.* (*Dalip Singh and Bhide, JJ.*, dissenting).—S. 27, Evidence Act, is *pro tanto* repealed by S. 162, Cr. P. Code, and evidence of information, whether it amounts to a confession or not, which relates to the fact discovered in consequence of such information must not be considered admissible in evidence, (*Young, C.J., Tek Chand, Dalip Singh, Monroe, Bhide, Din Mohammad and Ram Lall, JJ.*) HAKAM KHUDA YAR *v.* EMPEROR. **I.L.R. (1940) Lah. 242=188 I.C. 498=13 R.L. 1=41 Cr.L.J. 591=A.I.R. 1940 Lah. 129 (F.B.).**

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———S. 27—If affected by S. 162, Cr. P. Code. *See* CR. P. CODE, S. 162. **1940 A.W.R (H.C.) 229 (F.B.).**

———S. 27—*Information given by accused—Admissibility—Extent of.*

Under S. 27 of the Evidence Act so much of the information given by the accused as relates distinctly to the facts of the discovery in consequence of the information given by him may alone be proved, whether it amounts to a confession or not. Where the fact discovered was that the grave in which the corpse of the deceased was interred was dug up with a spade produced by the accused, the only part of the information given by him which can be admitted is that relating strictly to the discovery of the spade with which the grave was dug. It is not possible to admit any statement by him that he murdered the deceased. (*Burn and Lakshmana Rao, JJ.*) KARIYAN *v.* EMPEROR. **1937 M.W.N. 881.**

———S. 27—*Information leading to discovery of facts—Admissibility.*

Where the information given by the accused to the Police leads to the discovery of facts. So much of such information as relates to the discovery of the facts is admissible under S. 27 of the Evidence Act. The only portions given by the accused which can be admitted under S. 27 are those which rate distinctly to the facts discovered thereby. But statements made by one accused involving another accused, cannot be admitted when they do not in any way relate to those facts. (*Burn and Lakshmana Rao, JJ.*) ABDUL BASHA SAHIB *v.* EMPEROR. **1940 M.W.N. 764=52 L.W. 284.**

———S. 27—*Scope—Confession or information to police—Admissibility—Extent of—Statement of accused that he buried gun at particular place—Gun subsequently discovered there—Statement—If admissible.*

The intention of the Legislature in enacting S. 27, Evidence Act, was that the minimum portion of a confession made to a police officer or of information given to him should be admitted into evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order adequately to explain such discovery. Where, therefore, an accused, while in police custody, makes a statement that he had himself buried a gun at a certain place, and a gun is subsequently found at that place, such statement is admissible in evidence. (*Collister and Bajpai, JJ.*) EMPEROR *v.* CHOKHEY. **I.L.R. (1937) All. 710=1937 A.Cr.C. 105=170 I.C. 453=1937 A.L.J. 715=1937 A.L.R. 661 =38 Cr.L.J. 910 (2)=10 R.A. 108=1937 A.W.R. 616=A.I.R. 1937 All. 497.**

———S. 27—*Scope and effect—Confession induced by promises—Admissibility.*

S. 27 of the Evidence Act is in the nature of a proviso relating to the previous sections which lay down the general rules as to the inadmissibility of confessions made in certain circumstances. Whether a confession to which S. 27 of the Evidence Act applies was induced by promises or not is immaterial. The general ground for not admitting confessions made either to a police officer,

or made under any inducement, or made by persons while in custody, is clearly the danger of admitting false confessions; but the necessity for this precaution disappears when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. A.I.R. 1936 Nag. 200, Foll. (*Grille and Gruer, JJ.*) NAHRU *v.* EMPEROR. **I.L.R. (1937) Nag. 268 =9 R.N. 281=38 Cr.L.J. 642=168 I.C. 962= A.I.R. 1937 Nag. 220.**

———**S. 27**—*Scope—Statement admissible under —If excluded by S.* 162, *Cr. P. Code.*

The provisions of S. 27 of the Evidence Act have not been repealed by S. 162, Cr. P. Code. S. 27, Evidence Act, embodies the special rule, while S. 162, Cr. P. Code, is the general rule, and the latter rule does not derogate from the former. Therefore statements made by accused persons to the police after their arrest, and admissible under S. 27 of the Evidence Act are admissible in evidence against them and are not excluded by S. 162, Cr. P. Code. (*Burn and Stodart, JJ.*) MORRANNA *v.* EMPEROR. **188 I.C. 311=13 R.M. 16 =41 Cr.L.J. 573=1939 M.Cr.C. 126=50 L. W. 423=1939 M.W.N. 877=A.I.R. 1939 Mad. 840=(1939) 2 M.L.J. 635.**

———**S. 27**—*Scope—Statement by accused falling under S.* 162, *Cr. P. Code, leading to discovery of facts—Admissibility.*

Statements made by an accused to a Police Officer in the circumstances provided for in S. 27 of the Evidence Act, have been treated, as a matter of unquestioned practice in all the High Courts, as admissible in evidence, notwithstanding that they have been made to an investigating officer during the progress of an investigation, and fall under S. 162, Cr. P. Code. Both S. 27 of the Evidence Act and S. 162, Cr. P. Code, must be given effect to, S. 162, Cr. P. Code, having effect in every case except those to which S. 27, Evidence Act, applies by way of exception or proviso. (*Verma and Rowland, JJ.*) EMPEROR *v.* MAYADHAR POTHAL. **18 Pat. 450=181 I.C. 1001=5 B. R. 706=11 R.P. 653=40 Cr.L.J. 625=1939 P. W.N. 300=20 Pat.L.T. 420=A.I.R. 1939 Pat. 577.**

———**S. 27**—*Scope—Statement by accused to police admissible under—If shut out by S.* 162, *Cr. P. Code—Cr. P. Code, S.* 1 (2)—*Special law.*

S. 162, Cr. P. Code, is clearly wide enough to include statements made to a police officer which would be admissible under S. 27 of the Evidence Act as constituting information in consequence of which some fact has been discovered. But S. 162 does not shut out statements which are admissible under S. 27 of the Evidence Act. S. 27, Evidence Act, is a special law within the meaning of S. 1 (2) of the Cr. P. Code, and it is not derogated from by the general rule enacted in S. 162, Cr. P. Code. (*Burn and Stodart, JJ.*) SUBBIAH THEVAR, *In re.* **I.L.R. (1939) Mad. 947=184 I.C. 593=12 R. M. 469=1939 M.W.N. 1000=41 Cr.L.J. 41 =1939 M.Cr.C. 133=50 L.W. 318=A.I.R. 1939 Mad. 856=(1939) 2 M.L.J. 455.**

———**S. 27**—*Scope and applicability.*

S. 27 of the Evidence Act contemplates the discovery of material evidence. The material discovered would have no value unless it is relevant to the fact in issue and connected in some manner with the crime under investigation. Any information given by an accused person showing the relevancy of a fact to the crime must form an integral part of the discovery of the fact itself, namely material evidence, although it may indirectly amount to a confession. Hence a statement by the accused that he would point out the deceased's ornaments would be admissible under S. 27. (*Niyogi and Bruer, JJ.*) MOTILAL *v.* EMPEROR. **185 I.C. 310=12 R.N. 150=41 Cr.L.J. 158= 1939 N.L.J. 585=A.I.R. 1940 Nag. 66.**

———**S. 27**—*Statements leading to discovery, made by more than one person—Which statement is admissible—Doubt as to the order in which the statements were made—Effect.*

When two people make statements to the police leading to the discovery of property, it is only the first statement made that can be proved under S. 27 of the Evidence Act. But when it is doubtful as to who made the first statement that part of the evidence must be ignored. (*D. R. Norman.*) EMPEROR *v.* BHAGHU NATH. **1939 A.M.L.J. 56.**

———**S. 27**—*Statement leading to discovery— Proof of—Actual words of accused—Necessity to prove.*

It is true that the statement of an accused person falling under S. 27 of the Evidence Act should as far as it is admissible, be proved in the actual words of the accused. It is not enough to prove that the accused gave information to the police which led to discovery. But if evidence is given to show that the accused gave information, that would be admissible to show that the accused knew where the article discovered was. (*Reilly, C.J. and Singaravelu Mudaliar, J.*) *In re* ERAPPA. **17 Mys.L.J. 158.**

———**S. 27**—*Statement to police leading to discovery—Admissibility.*

No portion of any statement made by the accused to any police officer during investigation is admissible under S. 27 of the Evidence Act in as much as S. 162 of the Cr. P. Code contains specific words affecting S. 27 of the Evidence Act. (*Collister, Allsop and Braund, JJ.*) BALDEO *v.* EMPEROR. **I.L.R. (1940) All. 396=188 I.C. 562 =13 R.A. 48=1940 A.Cr.C. 57=41 Cr.L.J. 627=1940 A.L.J. 241=1940 A.W.R. (H.C.) 229=A.I.R. 1940 All. 263 (F.B.).**

———**S. 27**—*Statement leading to discovery of facts—What amounts to—Police officer already aware of what accused would say but procuring witness and then taking statement—Propriety— Admissibility of such statement.*

Under S. 27 of the Evidence Act, it is only when the information given by a person in custody leads to the discovery of any fact that such information would be admissible. Where the police officer knows beforehand precisely what the accused is going to say, and procures the presence of witness to witness the making of the statement of the accused and then the accused is brought out of custody and makes a statement and afterwards certain facts are discovered, it cannot be said that anything is discovered in consequence of the statement made by the accused to the police officer in the presence of the witnesses. This is mere farce and this manner of manufacturing evidence ought to be deprecated. S. 27 of the Evidence Act is not designed by the Legislature to encourage proceedings of this sort. (*Burn and Lakshmana Rao, JJ.*) PUBLIC PROSECUTOR *v.*

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SUBBA REDDI. **180 I.C. 590=11 R.M. 728=40 Cr.L.J. 433=1938 M.Cr.C. 346=1938 M.W.N. 1118=48 L.W. 780=A.I.R. 1939 Mad. 15.**

——**Ss. 27 and 26**—*Statement to police leading to discovery—Admissibility—Extra-judicial confession—If can be relied upon.*

Where as a result of certain statements made to a Sub-Inspector of Police by the accused while in police custody, a spear head and a lathi were recovered from the respective places where they were said to have been secreted by accused, such statements to the police officer are admissible in evidence under S. 27 of the Evidence Act, in a trial of the accused for an offence under S. 302, I. P. Code. Excepting in very rare cases, the value of extra judicial confession is not very high and where there is no other corroborative evidence in support of it, it is very unsafe to rely on such confession. (*Rachhpal Singh and Ismail, JJ.*) UDHAN *v.* EMPERER. **184 I.C. 390=12 R.A. 229 =40 Cr.L.J. 954=1939 A.Cr.C. 144=1939 A. L.J. 732=1939 A.W.R. (H.C.) 602=A.I.R. 1939 All. 685.**

——**S. 27**—*Statement to police—Recording of —Duty of police—Statement made second time repeating previous statement—Admissibility in evidence.*

It is not the duty of the police to decide what evidence is admissible and what is not, and a statement made by an accused person should not be mutilated. The duty of the police, if they desire to record a statement, is to record it as given and leave it to the Court what evidence is admissible. The practice of police officers giving statements not made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars must be condemned. Such second statement is inadmissible in evidence. It is the first statement of the accused, to whomsoever made, that leads to the discovery of a fact, if a fact is discovered. (*Burn and Mockett, JJ.*) CHENNA REDDI *v.* EMPEROR. **I.L.R. (1940) Mad. 254=1940 M.W.N. 86= A.I.R. 1940 Mad. 710.**

——**S. 27**—*Statement under—If to be voluntary—Induced statement—Admissibility and use of.*

There is no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under S. 27 of the Evidence Act. If it has been induced, it is of no evidential value, and the Court would exclude it from consideration. (*Mockett and Krishnaswamy Ayyangar, JJ.*) EMPEROR *v.* POLIGADU. **185 I.C. 829=12 R.M. 612=41 Cr.L.J. 242=50 L.W. 435 =1939 M.W.N. 878=A.I.R. 1930 Mad. 12.**

——**S. 27**—*Statements under—Mode of recording—Duty of police officers to use actual words of person making statement.*

Statements made by an accused person which are or may be provable under S. 27 of the Evidence Act should be clearly and carefully recorded by the police officers concerned. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. It will be for the trial Judge who has such a record before him to decide how much of it is admissible under the section. (*Beasley, C.J., Mockett and Horwill, JJ.*) ATHAPPA GOUNDAN, *In re.* **I.L.R. (1937) Mad. 695=1937 M.W.N. 442=46 L.W. 152= 171 I.C. 245=38 Cr.L.J. 1027=10 R.M. 321 =1937 M.Cr.C. 196=A.I.R. 1937 Mad. 618 =(1937) 2 M.L.J. 60 (F.B.).**

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——**S. 27**—*Statements under—Recording by police officers—Mode of—Need for clear and careful record—Necessity for use of first person and of exact words used—Admissibility of statements —Extent of—Considerations—Duty of Court.*

Statements made by an accused person containing information provable in evidence under S. 27 of the Evidence Act should be clearly and carefully recorded by the police officer and they should be recorded in the first person. They should not be paraphrased. If what a man says is to be used in evidence, his exact words must be used and not what a policeman or any one else says he said. When the police have recorded the statement, it will be in each case for the trial Court to decide how much of the statement is admissible under S. 27, that is to say, how much of such information as relates distinctly to the facts discovered may be proved. And in considering that, the Court should bear in mind the fact that so much of such information, whether it amounts to a confession or not, may be proved provided that it relates distinctly to the facts thereby discovered. (*Mockett and Horwill, JJ.*) PUBLIC PROSECUTOR *v.* VENKOBA RAO. **171 I.C. 225=38 Cr.L.J. 1025 =10 R.M. 320=1937 M.W.N. 441=(1937) 2 M.L.J. 32.**

——**S. 29**—Scope—If controlled by S. 164, Cr. P. Code—Record of confession as dying declaration without due warning being administered—Admissibility. *See* CR. P. CODE, S. 164. **1937 M. W. N. 1325.**

——**S. 30**—*Admissibility of confession by co-accused—Principle underlying—Confession, if should be of the same offence.*

The principle on which the confession of one accused is used against another is that self-implication is supposed to provide some guarantee of the truth of the accusation made against the other. Where the statement is exculpatory so far as possible, there is no such guarantee. Further the confession to be admissible must be a confession of the offence for which the accused persons are tried and not of some other offence. Hence where one confesses to his guilt under S. 201, I. P. Code, and implicates another for an offence under S. 302, the confession is not admissible. (*Pollock and Gruer, JJ.*) TIKARAM RATIRAM KURMI *v.* EMPEROR. **184 I.C. 258=12 R.N. 103=40 Cr.L. J. 934=1939 N.L.J. 469=A.I.R. 1939 Nag. 309.**

——**S. 30**—*Co-accused—Confessional statement by one—Not self-implicatory in respect of all charges—Admissibility—Limits.*

Where an accused does not implicate himself in his statement, in respect of the offence of murder, but implicates himself in respect of the disposal of the dead body, such a statement is not admissible against the co-accused in respect of the offence under S. 300, I.P. Code, but is only admissible in respect of the offence under S. 201, I. P. Code. (*Leach, C. J. and Burn, J.*) SYED HUSSAIN SAHIB *v.* EMPEROR. **1937 M.W.N. 1233.**

——**S. 30**—*Co-accused—Confession by—Not affecting all equally—Admissibility against others.*

There is nothing in the terms of S. 30 of the

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Evidence Act to suggest that a confession is not admissible in evidence against a person who is being jointly tried for the same offence with a man who has made the confession, if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The section only requires that it must affect both, but it does not state that it must affect them both equally. (*Allsop, J.*) ZAHID BEG *v.* EMPEROR. 173 I.C. 838=10 R.A. 508=1938 All.L.R. 180=39 Cr. L.J. 364=1937 A.W.R. 1099=1937 A.L.J. 1253=A.I.R. 1938 All. 91.

———S. 30—*Co-accused—Confession of—Accused pleading guilty—Confession of—Admissibility against co-accused—Sessions trial and Magisterial trial—Distinction.*

Per *Full Bench.*—In considering the question whether the confession of the co-accused who pleaded guilty can be used against the other co-accused under S. 30, Evidence Act, a distinction mst be made between summons and warrant cases on the one hand and Sessions cases on the other. In Sessions cases if the accused pleads guilty the Court cannot try him but has forthwith to convict him. His conviction cannot be deferred so as to enable the Court to use his confession against his co-accused. But in warrant cases, it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against the other co-accused under S. 30, Evidence Act. (*Grille, J.C., Niyogi and Pollock, A.J.Cs.*) AMDUMIYAN GULJAR *v.* EMPEROR. I.L.R. (1937) Nag. 315=166 I.C. 582 and 587=9 R.N. 126 and 132=38 Cr.L.J. 237 and 251=A.I.R. 1937 Nag. 17 (F.B.).

———S. 30—Co-accused—Confession of—Admissibility against other accused. *See* EVIDENCE ACT, SS. 27 AND 30. (1937) 2 M.L.J. 60 (F.B.).

———S. 30—*Co-accused—Confession of admissibility—Conditions.*

For statements of co-accused to be admissible in evidence under S. 30, Evidence Act, against the accused, the co-accused must be tried jointly for the same offence. Thus when a confession made by one of the co-accused affecting himself and another co-accused is proved, the Court may take such confession in consideration against the co-accused as well as against the accused who made it. Where the co-accused, is not tried for the same offence as that of the accused, the statements made by the co-accused cannot be taken into account against the accused. Moreover the statement of the co-accused ranks lower than the evidence of an accomplice, because it is not made on oath nor is it tested by cross-examination, and therefore corroborative evidence is always necessary. (*Davis, J.C. and Mehta, A.J.C.*) MEWO BADAL *v.* EMPEROR. 166 I.C. 37=9 R.S. 118=38 Cr.L.J. 124=1936 Cr.C. 1092=A.I.R. 1936 Sind 236.

———S. 30—*Co-accused—Confession of—Admissibility against the other.*

A confession of a co-accused is admissible against another accused only if it equally implicates the confessor with his colleague in crime. Where, therefore, the confession of a co-accused does not implicate him in the murder but puts the blame entirely upon the other and as far as it implicates him, it only does so to the extent of the

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crime of concealing the evidence of the murder, that part of his confession relating to the murder is not admissible in evidence against the other, and the confession can be admitted against the other only so far as it relates to the concealment of the body and the crime committed under S. 201, I. P. Code. (*Young, C.J. and Monroe, J.*) MANGAL SINGH *v.* EMPEROR. 17 Lah. 547=38 P. L.R. 1018=167 I.C. 861=9 R.L. 562=38 Cr. L.J. 472=A.I.R. 1937 Lah. 127.

———S. 30—*Co-accused—Confession of—Admissibility—Conditions.*

S. 30, Evidence Act, clearly contemplates that the statement of one accused admissible against his co-accused must be made in the same trial when both accused are charged with the same offence and it must be a confession which affects himself as well as his co-accused. (*Davis, J.C.*) RIJUMAL KUNDANMAL *v.* EMPEROR. 170 I.C. 746 =38 Cr.L.J. 965=10 R.S. 72=A.I.R. 1937 Sind 218.

———S. 30—*Co-accused—Confession of—Conditions of admissibility.*

S. 30 of the Evidence Act requires that the confession of a co-accused should be one affecting its maker, that is, it must incriminate its maker or it is of no value against a co-accused; but the law does not go so far as to require that the confession should claim for its maker the leading part in the crime. (*Noor and Rowland, JJ.*) EMPEROR *v.* SADASIBO MAJHI. 18 Pat. 82=178 I.C. 130=11 R.P. 215=5 B.R. 53=39 Cr.L.J. 997=1938 P.W.N. 754=19 Pat.L.T. 801= A.I.R. 1939 Pat. 35.

———S. 30—*Co-accused—Confession of—Evidentiary value.*

Per *Biswas, J.*—The true effect of S. 30, Evidence Act, is that the Court can only treat a confession as lending assurance to other evidence against a co-accused. A conviction however on the confession of a co-accused alone would be bad in law. 38 Cal. 559, Foll. (*Patterson, Nasim Ali and Biswas, JJ.*) NITAI VHANDRA JANA *v.* EMPEROR. 170 I.C. 201=10 R.C. 98=38 Cr. L.J. 852=A.I.R. 1937 Cal. 433 (S.B.).

———S. 30—*Co-accused—Confession of—Evidentiary value.*

A confession of a co-accused cannot be the main evidence in a case but it is the weakest possible kind of evidence which cannot be acted upon. Hence such a bare statement in the confession of a co-accused is not alone sufficient to justify a finding of guilty of so grave an offence as that under S. 396. (*Mya Bu and Dunkley, JJ.*) AH PHUT *v.* THE KING. 1940 Rang.L.R. 104=185 I.C. 205=12 R.R. 185=41 Cr.L.J. 129=A. I.R. 1939 Rang. 402.

———S. 30—*Co-accused—Confession of—Evidentiary value.*

It is not quite clear as to what is the exact meaning of "tainted evidence"; whether it means that the person giving the evidence is tainted morally; or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, one cannot call this, tainted evidence,

for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, therefore, it must be believed. In such case it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false or that some of the statements made therein are also false. The Court may take the confession of a co-accused person into consideration against the other co-accused; that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused. (*Mackney, J.*) NGA MYA *v.* EMPEROR. **1938 Rang.L.R. 30 =174 I.C. 947=39 Cr.L.J. 481=10 R.R. 449= A.I.R. 1938 Rang. 92.**

———S. 30—*Co-accused—Confession of—Evidentiary value.*

The evidential value of a confession made by a co-accused is not very high. But the confession receives confirmation when it leads to the arrest and identification of the other accused. (*Skemp and Beckett, JJ.*) ISHAR SINGH *v.* EMPEROR. **I.L.R. (1939) Lah. 67=41 P.L.R. 424.**

———S. 30—*Co-accused — Confession of—If evidence against other accused.*

A confession made by a co-accused can only be taken into consideration against the other accused under S. 30 of the Evidence Act, but such confession cannot take the place of evidence, and is not evidence, against the other accused. (*Pandrang Row, J.*) RAMASWAMY GOUNDAN *v.* EMPEROR. **177 I.C. 494=39 Cr.L.J. 894=11 R.M. 330=1938 M.W.N. 577=1938 M.Cr.C. 67=47 L.W. 139=A.I.R. 1938 Mad. 675.**

———S. 30—*Co-accused—Confession of—Sufficiency to base conviction—Corroboration—Nature and extent of.*

The confession of a co-accused uncorroborated by any other evidence is not alone sufficient to support a conviction. But there is no warrant for holding that when a conviction is sought to be based on the confession of a co-accused together with corroborative evidence such corroborative evidence cannot be used unless it is sufficient, if believed, itself to support a conviction. But the rule that has to be accepted, at least as one of prudence if not of law, is that against a co-accused a confession can carry no weight unless it is substantially corroborated by good evidence from other sources. (*Noor and Rowland, JJ.*) EMPEROR *v.* SADASIBO MAJHI. **18 Pat. 82=11 R. P. 215=178 I.C. 130=5 B.R. 53=39 Cr.L.J. 997=1938 P.W.N. 754=19 Pat.L.T. 801= A.I.R. 1939 Pat. 35.**

———S. 30—*Co-accused — Confession of—Use against other accused—Extent.*

A confession by an accused may be taken into consideration as against a co-accused under S. 30 of the Evidence Act. It does not stand on the same level as substantive evidence but it may be used to supplement the substantive evidence. (*Niyogi and Pollock, JJ.*) BALIRAM SINGH *v.* EMPEROR. **184 I.C. 274=12 R.N. 106=40 Cr.L. J. 937=1939 N.L.J. 442=A.I.R. 1939 Nag. 295.**

———S. 30—*Co-accused—Confession of—Use of —Limits.*

When the substantive evidence is not sufficient to establish a *prima facie* case against the accused it is not permissible to use the confession of a co-accused under S. 30 of the Evidence Act, as if it were itself substantive evidence, which it is not. It may only be taken to lend assurance to any relevant evidence bearing on the accused's complicity in the crime. It can in no case be used to fill up the gap in the prosecution evidence. (*Niyogi, J.*) MAROTI JAGO *v.* CROWN. **188 I.C. 146=12 R.N. 333=41 Cr.L.J. 553=1940 N.L. J. 210=A.I.R. 1940 Nag. 230.**

———S. 30—*Co-accused—Use of his statement.*

The statement of a co-accused made in his own interest cannot be used by the prosecution as substantive evidence to prove the offence against the other accused. (*Nanavutty, J.*) ASHIQ ALI *v.* EMPEROR. **1936 O.W.N. 671.**

———S. 30—Co accused—Confession of, who is dead—Admissibility. *See* EVIDENCE ACT, S. 10, **A.I.R. 1938 Sind 94.**

———S. 30—*Confession—Admissibility against co-accused—Conditions of.*

Under S. 30 of the Evidence Act in order that a confession may be used against a co-accused, it is necessary that the admission or confession implicates the maker of the confession to the same extent as it implicates the co-accused. The confession must implicate the confessing person substantially to the same extent, as it implicates the person against whom it is to be used, in the commission of the offence for which they are both being jointly tried. (*Wadia, J.*) EMPEROR *v.* BHAGWANDAS BISESAR. **42 Bom.L.R. 938.**

———S. 30—*Confession by accused before inquiring Magistrate and implicating co-accused—Admissibility against co-accused and evidentiary value of.*

A confession made by an accused in the dock before the inquiring Magistrate in the presence of his co-accused implicating himself and the co-accused in the offence charged and after due warning by the Magistrate is admissible against his co-accused. Not only may that confession be taken into consideration, but it has considerable probative value. (*Burn and Stodart, JJ.*) EMPEROR *v.* VELU NAICKEN. **184 I.C. 302=12 R. M. 431=40 Cr.L.J. 913=50 L.W. 920=1939 M.Cr.C. 90=1939 M.W.N. 611=A.I.R. 1939 Mad. 737=(1939) 2 M.L.J. 202.**

———S. 30—*Confession of accused falling under S. 27—Admissibility and use of against co-accused —Absence of sufficient independent evidence—Effect.*

A confession by a co-accused may be taken into consideration against another accused; confessional statements under S. 27 of the Evidence Act come within the terms of S. 30. But there must be admissible evidence to point to the co-accused's guilt. In assessing the probative value of the evidence, a co-accused's confession may be taken into consideration. But where the evidence

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against the co-accused is only that he was in the company of the other accused before the crime and after the crime, there is no sufficient basis to convict him. (*Burn and Mockett, JJ.*) RAMI REDDI, *In re.* **1940 M.W.N. 1045=52 L.W. 420 (2).**

———S. 30—*Confession of co-accused—Admissibility and value of as against other accused.*

The confessions of a co-accused implicating his co-accused in the crime are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under S. 30 of the Evidence Act along with such other evidence as there may be. While such a confession may help the Court to decide whether the other evidence is or is not credible, it cannot supply the place of positive evidence regarding the commission of the crime. (*Burn and Lakshmana Rao, JJ.*) KARUPPAN CHETTIAR *v.* EMPEROR. **52 L.W. 258=1940 M.W.N. 767.**

———**S. 30 and Cr. P. Code (V of 1898), S. 342**—*'Confession' in S. 30, meaning of—If can refer to confessions during examination under S. 342, Cr. P. Code—Such confessional statements, if can be used against the co-accused.*

The word 'confession' used in S. 30 of the Evidence Act clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot therefore signify any matter which comes on the record at the end of the prosecution evidence, namely, answers to questions put under S. 342, Cr. P. Code. Hence the statement made by a co-accused confessing partially or wholly, his guiit when examined under S. 342, Cr. P. Code, cannot be taken into consideration under S. 30, Evidence Act, against the other accused. (*Niyogi and Gruer, JJ.*) SUMITRA *v.* EMPEROR. **190 I.C. 273=1940 N.L.J. 343 =A.I.R. 1940 Nag. 287.**

———S. 30—*Construction and Scope—Confession of co-accused—If evidence—Conviction based on—Legality—Evidence of accomplice—Distinction.*

It is a fallacy to say that the confession of a co-accused can be dealt with on the same basis as the evidence of an accomplice. One cannot take the confession of a co-accused as the basis of the prosecution case in the same way as the evidence of an accomplice. The evidence of an accomplice is given on oath, and the witness is subject to cross-examination. S. 133 of the Evidence Act shows that a conviction based on the uncorroborated evidence of an accomplice is not bad in law, although in practice the Courts in India refuse to convict on such evidence. S. 30 of the Evidence Act, the language of which is very guarded does not say that the confession of a co-accused is to be treated as evidence against any one except the confessing party. All it says is that the confession may be traken into consideration. It is one relevant fact which the Court has to consider. But the confession is not strictly evidence against a co-accused, and a conviction based solely on the confession of a co-accused would be bad in law. The confession of a co-accused is not evidence at all as defined by S. 3 of the Evidence Act. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* LAXMAN JAIRAM. **166 I.C. 569=9 R.B. 239=38 Bom.L.R. 1122=A.I.R. 1937 Bom. 31.**

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———S. 30—*Joint trial of two persons one for rape and other for abduction—Confession of one—If admissible against other.*

When two persons are jointly tried, one for the offence of a rape of a girl and the other for the abduction of that girl, they are not tried for the same offence. Consequently a confession made by one of them affecting himself and the other is not admissible in evidence against the other under S. 30 of the Evidence Act. (*Derbyshire, C.J. and Mukherjea, J.*) NARESH CHANDRA *v.* EMPEROR. **176 I.C. 560=39 Cr.L.J. 723= 11 R.C. 125=42 C.W.N. 814=A.I.R. 1938 Cal. 479.**

———S. 30—*Retracted confession—Admissibility against co-accused—Corroboration—Rule as to.*

A retracted confession of a co-accused is admissible in evidence against his co-accused; but the rule of prudence is to seek corroboration before a conviction is based on it. What the nature of the corroboration should be will depend on the facts of each particular case. (*Varma and Rowland, JJ.*) EMPEROR *v.* MANGRU KISAN. **16 Pat. 612=19 Pat.L.T. 104=1938 P.W.N. 25= 4 B.R. 284=173 I.C. 507=39 Cr.L.J. 325=10 R.P. 418=A.I.R. 1938 Pat. 108.**

———S. 30—*Retracted confession of co-accused —Admissibility and use of—Limits to—Duty of Judge to explain section to jury.*

It is not the law that the confession of one accused can never be used against his fellow-accused if it has been retracted by the accused who made it. If the Court is convinced that the confession was made valuntarily at the time it was made, then it can be used against the accused who made it, and, so far as the law allows it, it can also be used against the other accused who are implicated in it. No such confession can ever be evidence of any kind against the other accused. If there is evidence against the other accused concerned, then the confession may, if the Court thinks fit, be taken into consideration as a reason for believing the truth of that evidence, but nothing supplied in the confession alone can be used as evidence against the accused who has not made it. A Sessions Judge, while charging the jury as to the effect of a confession should explain the provisions of S. 30 of the Evidence Act to the jury. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SETTY, *In re.* **17 Mys.L.J. 238.**

———S. 30—*Retracted confession of co-accused implicating co-accused and not implicating himself —Admissibility.*

A re-tracted confession by one of two accused persons charged of the offence of murder, about taking part in the disposal of the dead body, which does not implicate the maker of the confession in anything which preceded the death cannot be taken into consideration against his co-accused. (*Pandrang Row, J.*) GOVINDU SUBBARAMAYYA, *In re.* **45 L.W. 93=1937 M.W.N. 178 =169 I.C. 372=38 Cr.L.J. 753=10 R.M. 19= 1937 M.Cr.C. 81=A.I.R. 1937 Mad. 321=(1937) 1 M.L.J. 750.**

———S. 30—*Retracted confession—Use of against co-accused.*

Where there is no evidence at all except the retracted confession of a co-accused an accused cannot be convicted on the basis of the retracted confession of his co-accused. But when there is

considerable circumstantial evidence connecting the accused with the crime charged, the Court is entitled to use the confession of a co-accused to remove any doubts that might still linger in its mind. (*Mockett and Horwill, JJ.*) MUNEYYA, *In re.* **I.L.R. (1938) Mad. 348=173 I.C. 1001=10 R.M. 643=39 Cr.L.J. 390=1937 M.Cr.C. 189=1937 M.W.N. 537=46 L.W. 144=A.I.R. 1937 Mad. 755.**

———**S. 30**—*Retracted confession of co-accused—Value of.*

The general rule of English law and the rule which prevailed in India before the passing of the Evidence Act was that the confession of an accused person was only evidence against himself and could not be used against others. S. 30 of the Evidence Act is an exception to this rule. The weakness of the guarantee afforded by self-implication and the dangerous and the exceptional character of the evidence require that this section should be construed very strictly; and where the guarantee afforded by self-implication is rendered nugatory by the confessing accused himself retracting his confession and denying the truth of the statements made therein, then little or no reliance can be placed upon such a retracted confession so far as the co-accused are concerned. The Court could not legitimately apply rules of prudence which relate to the sworn testimony of an accomplice or approver to the retracted confession of a confessing prisoner, and by means of the application of these rules impliedly make that retracted confession substantive evidence against the persons accused along with the confessing prisoner. (*King, C.J. and Nanavutty, J.*) BABOO SINGH *v.* EMPEROR. **11 Luck. 662=159 I.C. 875=37 Cr.L.J. 163=8 R.O. 212=1936 O.W.N. 64=1936 O.L.R. 5=1936 Cr.C. 274=A.I.R. 1936 Oudh 156.**

———**S. 30**—*Retracted confession—Value of, against co-accused.*

A retracted confession may be valuable evidence against the accused making the confession but it is of very little value against a co-accused. (*Abdul Rashid, J.*) SINGHA *v.* EMPEROR. **174 I.C. 849 (1)=39 Cr.L.J. 491=10 R.L. 619=40 P.L.R. 58=A.I.R. 1938 Lah. 252.**

———**S. 30**—*Retracted exculpatory confession—Admissibility against co-accused.*

A confession by an accused of an exculpatory nature and subsequently retracted cannot be used against a co-accused though it may be admissible as against himself. (*Mohammad Noor and Varma, JJ.*) EMPEROR *v.* RAMSIDH RAI. **176 I.C. 530=39 Cr.L.J. 725=11 R.P. 79=4 B.R. 724=1938 P.W.N. 559=A.I.R. 1938 Pat 352.**

———**S. 30**—*Scope—Joint trial of two persons—Death of one after making confession—Admissibility of confession—Conviction based on—Sustainability.*

J was put on his trial along with *L*; the trial proceeded for some time and about six months before the delivery of judgment, when the trial had proceeded for more than a year or about a year *J* died; before his death, his confession had been put on the record.

Held, that the confession made by *J* though it might be admissible in evidence and could be used against *L*, could only be used for purposes of

corroborating the other evidence which was on the record. But it could not be used as substantive evidence by itself.

Henderson, J.—When the confession is used in a way not warranted by S. 30 of the Evidence Act, and when the evidence apart from the confession is insufficient to prove the guilt of *L*, the conviction based on the confession cannot be supported. (*Henderson and R.C. Mitter, JJ.*) RAM SARUP SINGH *v.* EMPEROR. **167 I.C. 162=9 R.C. 652=38 Cr.L.J. 339=41 C.W.N. 183=A.I.R. 1937 Cal. 39.**

———**S. 30**—*Statement of accused taken under S. 164, Cr. P. Code—Admissibility against co-accused.*

A statement of an accused person taken under S. 164, Cr. P. Code does not amount to confession as contemplated by S. 30, Evidence Act so as to be used against a co-accused as evidence, unless the person making the statement incriminates himself. Such a confession to be used against a co-accused must be an *unreserved confession of his own guilt* implicating at the same time the person against whom it is sought to be used. The reason is that an admission of one's own guilt operates as a sort of sanction, which to some extent, takes the place of oath, and so affords some guarantee that the whole statement is true. (*Nawal Kishore, C.J. and Ranjitmal, J.*) SARKAR *v.* POONAMSINGH. **1939 M.L.R. 19 (Cr.).**

———**S. 30**—*Statement of co-accused—Admissibility.*

The statement of an accused person which does not amount to a confession cannot be used against his co-accused. (*Blacker, J.*) AMAR NATH *v.* EMPEROR. **42 P.L.R. 378.**

———**S. 31 and Agra Tenancy Act (1926), S. 44**—*Admissions—Value of—Admission of tenant's status—If bars suit under S. 44 of Agra Tenancy Act.*

Admissions under S. 31 of the Evidences Act are no doubt, not conclusive proof of the matters admitted, but they may operate as estoppels. Where in proceeding under S. 106 of the Agra Tenancy Act the landholder has admitted the status of the tenants, it would bar a suit under S. 44 against the same tenants. (*Mehta, J.M.*) SHARD MAHESH PRASAD SINGH SHAH *v.* RAJA RAM. **1939 R.D. 299=1939 A.W.R. (B.R.) 253.**

———**S. 31**—*Admissions—Value* — Bona fide *mistake—Correction—Permissibility.*

Admissions are not conclusive proof, and though they may operate as estoppel, it is open to a party to correct an admission made by him if it is shown to have been made under a *bona fide* mistake and has not caused any prejudice to the other side. (*Weston.*) MOTI LAL *v.* LACHMI NARAIN. **1937 A.M.L.J. 86.**

———**S. 31**—*Admissions by party—How far binding.*

An admission made by a party is not binding on him and its only effect is to shift the burden as against him. He is at liberty to prove that his admission was mistaken or untrue and is not estopped or concluded by it unless another person has been induced by it to alter his condition. (*S. K. Ghose and Patterson, JJ.*) BROJENDRA MOHAN MOITRA *v.* MAHARAJA SRISH CHANDRA NANDI. **67 C.L.J. 495.**

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———S. 31—*Interpretation of.*

What S. 31 of the Evidence Act means is that an admission, unless it amounts to an estoppel, is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement. (*Ba U. J.*) THE KING *v.* SAW MIN. **1939 Rang.L.R. 97=182 I.C. 705=40 Cr.L.J. 691=12 R.R. 25=A.I.R. 1939 Rang. 219.**

———S. 32—*Admission of statement as to age—Depositions and Registrar's endorsements as to age—Presumption.*

Where the age of a witness is given in the paper containing the deposition of the witness and appears to have been recorded by the presiding officer, there is no reason either to presume that the presiding officer instead of following the obvious, and usual course of asking the witness's age should have put down the age merely by guesswork. Similarly the entries in the registration endorsements are made by the Sub-Registrar himself and the presumption is that he also would follow the obvious and correct course of asking persons their age instead of guessing it. (*Hamilton, J.*) JADUNATH SINGH *v.* BISHESHAR SINGH. **178 I.C. 950=1938 O.W.N. 1267=1939 O.A. 2 =11 R.O. 127=1938 O.L.R. 527=A.I.R. 1939 Oudh 17.**

———S. 32—Applicability—Statement of person not proved to be dead—Admissibility. *See* EVIDENCE ACT, SS. 8 AND 32. **40 P.L.R.J., & K. 1.**

———S. 32—*Construction—"Written statement by person who is dead"—Meaning of.*

The wording of S. 32 must be construed strictly. The expression "written statement made by a person who is dead" means that the written statement must have been actually made by the deceased person. A person may make a written statement either by writing it out himself or by dictating it to somebody else. Usually a person who is in immediate expectation of death is too feeble to be able to write out his statement himself, but if any written statement is produced in Court purporting to have been made by a person who is dead, it mst be shown, if that person did not write that statement, that he himself dictated the statement, and that he did not make the statement in answer to any questions (except such a question as "will you please state what it is you wish to be written down?") and there must be a guarantee that the dictation has been taken down correctly. Usually the best way to establish this is to show that the dictated statement was read over to the deceased and admitted by him to be correct. A.I.R. 1931 M. 430 and A.I.R. 1922 C. 382; *Rex v. Gay* (1835), 7 C. and P. 230, Rel. on. (*Ba U and Mackney, JJ.*) NGA MYA DA *v.* EMPEROR. **160 I.C. 597=37 Cr.L.J. 299=8 R.R. 402=1936 Cr.C. 41=A.I.R. 1936 Rang. 42.**

———S. 32—*Dying declaration—Gunshots in all parts of body—Capacity of victim to make declaration.*

The receipt of forty-two gunshot wounds in the liver, heart, stomach and lungs and profuse haemorrhage occasioned thereby, would cause a great deal of shock and the probability is that the victim becomes unconscious within a few minutes incapable of making any dying declaration. (*Young, C.J. and Monroe, J.*) ANANT RAM MAYA RAM *v.* EMPEROR. **174 I.C. 989=10 R.L. 653=39 Cr.L.J. 512=A.I.R. 1938 Lah. 262.**

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———S. 32—*Dying declaration—Wound puncturing liver, lung and stomach—Capacity of victim to make declaration.*

Where a deceased received a spear wound which penetrated the chest wall on the right side, went through the ribs, through the diaphragm, penetrated the right lobe of the liver, completely penetrated the whole liver and came out of the left lobe of the liver and then went through the stomach and finally through the ribs on the left side of the chest and through the chest wall.

Held, that there was great difficulty in believing that the deceased could possibly have lived for two hours after receiving an injury of this description, much less could have been conscious. The probability of his ever living to make a dying declaration two hours later was too remote to be considered. (*Young, C.J. and Monroe, J.*) DHARAM SINGH *v.* EMPEROR. **174 I.C. 973=10 R.L. 651=39 Cr.L.J. 508=A.I.R. 1938 Lah. 268.**

———S. 32—*Oral evidence of verbal statements—Admissibility—Witness interested in result of litigation.*

S. 32 of the Evidence Act speaks of statements both written and verbal, and a Court cannot refuse to admit oral evidence of a verbal statement which fulfils the requirements of the section, merely because the evidence offered is the testimony of a witness who is interested in the result of the litigation. (*Khundkar, J.*) SISIR KUMAR SISIR KUMAR SAHA *v.* JOGNESWAR SAHA. **42 C.W.N. 359.**

———S. 32—*Scope—Will by Hindu—Statement that his son is separate from him—Self serving statement—Admissibility to prove division in status.*

A statement by a deceased Hindu in his will, in his own favour, is not admissible under the Evidence Act for the purpose of showing that there was a severance of the joint family tie between him and his son. Such a statement cannot be brought within the provisions of any of the clauses enumerated in S. 32, Evidence Act. (*Rupchand Bilaram, and Haveliwala, A.J.Cs.*) MANGLOMAL SUGNOMAL *v.* MT. PADIBAI. **167 I.C. 444 =9 R.S. 193=A.I.R. 1936 Sind 217.**

———S. 32—*Statement by murdered person about motive for murder—Evidence of—Admissibility.*

Statements made by a murdered person prior to the murder as to the accused's motive are not statements falling under S. 32 of the Evidence Act, and evidence of such statements is not admissible in evidence to prove the motive for the murder. (*Burn and Venkataramana Rao, JJ.*) VEERANKUTTI HAJI *v.* EMPEROR. **177 I.C. 808= 11 R.M. 387=39 Cr.L.J. 947=48 L.W. 615= 1938 M.W.N. 868=(1938) 2 M.L.J. 618.**

———S. 32 (1)—*Applicability—Admission of dying declaration—Method of proof.*

The dying declarations of a deceased person are admissible under S. 32 (1) of the Evidence Act. The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to

a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all. (*Almond, J.C. and Mir Ahmad, J.*) HANIF GUL *v.* EMPEROR. **176 I.C. 471=11 R.Pesh. 9=39 Cr.L.J. 744=A.I.R. 1938 Pesh. 33.**

——S. 32 (1)—*Applicability—Statement by deceased to Police about attack by accused which caused death—Subseqent dying declaration recorded by Magistrate to same effect—Admissibility—Reference to motive of assailant—If inadmissible—Proof of statement by police officer and Magistrate—Sufficiency.*

The deceased who was attacked by the accused and received several injuries, was taken to the police-station where he himself laid the first information on which the prosecution was instituted. He was then removed to the hospital where he died the same night. When his condition became critical, a Magistrate came and took his statement as a dying declaration in which he named the accused as his assailants. The dying declaration was to this effect: "The accused assaulted me on account of enmity caused by my acting as a wizard." The Sub-Inspector who recorded the statement of the deceased was examined at the trial and stated that he took down the first information report in the own words of the deceased in the presence of two attesting witnesses who also signed the first information. The Magistrate who recorded the dying declaration was also examined and stated that the deceased was in his senses, and that he read over the statement to the deceased who admitted to be correct.

Held, (1) that the statements of the deceased were a statement as to the circumstances of the transaction which ended in his death within the meaning of S. 32 (1) of the Evidence Act, and that the fact that the deceased referred to the enmity caused by his acting as a wizard as a motive for the attack did not make it anything other than such statements or render the same inadmissible; (2) that the evidence of the Sub-Inspector and the Magistrate amounted to sufficient attestation and proof of the statement to make it admissible under S. 32, Evidence Act.

Held, further, it is not the law that the written record cannot be used at all, but that it is not to be used without first examining as a witness the person who made the statement. (*Varma and Rowland, JJ.*) EMPEROR *v.* SOMRA BHUIAN. **16 Pat. 593=173 I.C. 499=10 R.P. 421=39 Cr.L.J. 332=4 B.R. 281=19 P.L.T. 86=1937 P.W.N. 897=A.I.R. 1938 Pat. 52.**

——S. 32 (1)—*"Circumstances of the transaction"—Meaning of—Admissibility of statement—Condition of.*

statement falling under S. 32 (1) of the Evidence Act may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. A statement by the deceased that he is proceeding to the spot where in fact he was killed later, or as to his reasons for so proceeding or that he had been invited by a particular person to meet him, or that he was going to such person would each of them be circumstances of the transaction, and would be so

whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The "circumstances of the transaction" must have some proximate relation to the actual occurrence, though as for instance, in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. The "circumstances" are of the transaction which resulted in the death of the declarant; it is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, the condition of the admissibility of the evidence being that "the cause of [the declarant's] death comes into question." (*Lord Atkin.*) NARAYANYSWAMI *v.* EMPEROR. **66 I.A. 66=I.L.R. (1939) Kar. 123=18 Pat. 234=1939 All.E.R. 396=43 C.W.N. 473=1939 A.W.R. (P.C.) 35=49 L.W. 349=180 I.C. 1=1939 O.W.N. 282=1939 A.Cr.C. 49=1939 M.W.N. 185=1939 OL.R. 134=1939 P.W.N. 205=20 Pat.L.T. 265=1939 A.L.J. 298=69 C.L.J. 273=41 P.L.R. 272=5 B.R. 449=40 Cr.L.J. 364=41 Bom.L.R. 428=11 R.P.C. 166=6 Cut. L.T. 25 (P.C.)=1939 M.Cr.C. 114=A.I.R. 1939 P.C. 47=(1939) 1 M.L.J. 756 (P.C.).**

——S. 32 (1)—*Dying declaration—Admissibility—Extent of—"Transaction".*

The dying declaration made by the deceased to the village Magistrate within two hours of the offence was as follows: "*A* 4 caught hold of my senior son *P* (deceased). *A* 2 and *A* 1 cut *P* with an aruval and stabbed him in the thigh with a spear. When I shouted, *P*, son of *V S* (an absconding member of the accused party) and *A* 10, cut with an aruval and stabbed with a spear on the head and pushed me down."

Held, that the whole of the statement and not merely the last sentence which explained the immediate cause of the speaker's death, was admissible and could be used under S. 32 (1) of the Evidence Act, because the whole of it related to one transaction resulting in his death within the meaning of S. 32 (1); consequently the whole of it was admissible in evidence against all persons mentioned therein. (*Horwill, J.*) RAMAN SERVAI *v.* EMPEROR. **1937 M.W.N. 333.**

——S. 32 (1)—*Dying declaration—Admissibility against all concerned in transaction.*

Statement by deceased as to the cause of his death are admissible, not only as against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death, in cases in which the cause of that person's death comes into question. 35 I.C. 998 and 2 Weir 750, foll. (*Mosely and Ba U. JJ.*) NGA HLA DIN *v.* EMPEROR. **162 I.C. 491=8 R.R. 569=37 Cr.L.J. 621=1936 Cr.C. 347=A.I.R. 1936 Rang. 187.**

——S. 32 (1)—Dying declaration—Answers by deceased in the form of signs and gestures in answer to questions put to him—Admissibility. *See* EVIDENCE ACT, SS. 8 AND 32 (1). **38 Bom.L.R. 818.**

——S. 32 (1)—*Dying declaration—Conviction if can be based on.*

It is of course a fact that for an accused person to be convicted on a dying deposition alone the

Court must be quite satisfied that the dying deposition bears all the marks of truth, and it must be examined with care remembering that the statement is an *ex parte* statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it; but where the Court is satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, that he did recognize him, and that he was telling the truth when he made his dying deposition, a conviction can be passed solely on such confession. (*Baguley ad Mosely, JJ.*) THE KING *v.* MAUNG PO THI. **176 I.C. 683=11 R.R. 72 39 Cr.L.J. 771=A.I.R. 1938 Rang. 282.**

———S. 32 (1)—*Dying declaration—Corroboration—Necessity for—Nature of corroboration.*

It is a well-accepted practice that dying declarations should be corroborated in material particulars and by independent testimony. (*Mockett and Krishnaswami Aiyangar, JJ.*) RAMAMURTHY *v.* EMPEROR. **1940 M.W.N. 163.**

———Ss. 32 (1), 159 and 160—*Dying declaration—Proof of.*

Statements made by a person who is dead must be proved whether they are written statements or verbal statements. If they are verbal statements, the persons who heard the deceased make the verbal statements must be examined on oath as witnesses, and if a person at the time made a record of the deceased's statement he may refresh his memory by referring thereto (S. 159, Evidence Act) or if he has no specific recollection of the statements made he may, under S. 160, Evidence Act, testify to facts mentioned in the document if he is sure that the facts were correctly recorded by him. In the latter case the witness must still depose by reference to the document as to what the deceased said. It is not necessary for the witness to read out his statement and for the Magistrate to record what the witness reads out. The witness may be said to testify to the facts mentioned in the document if he produces the document and swears that all that is written therein was actually stated by the deceased. If the document is thus put on record it does not become in the strict sense substantive evidence, but it forms part of the testimony of the witness who recorded it. If the statement to be proved is a written statement made by a person who is dead, then it must be proved that such statement was so made by the person who is dead. In that case of course the written statement itself becomes substantive evidence. A "dying deposition" comes on the record under S. 160 and not as a written statement made by a deceased under S. 32 (1). (*Ba U and Mackney, JJ.*) NGA MYA DA *v.* EMPEROR. **160 I.C. 597=37 Cr.L.J. 299=8 R.R. 402=1936 Cr.C. 41=A.I.R. 1936 Rang. 42.**

———S. 32 (1)—*Dying declaration—Recording of—Asking of relevant questions—Desirability.*

An injured man who is waiting to be operated on should not be subjected to any thing like a third degree cross-examination by the Magistrate who records his dying deposition; but the Magistrate should not content himself with merely recording the statement made by the injured man: he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. (*Baguley and Mosely, JJ.*) THE KING *v.* MAUNG PO THI. **176 I.C. 683=11 R.R. 72=39 Cr.L.J. 771=A.I.R. 1938 Rang. 282.**

EVIDENCE ACT (1872), S. 32.

———S. 32 (1)—*Dying declaration—Sufficiency for conviction.*

There are many cases in which it is quite safe to convict on a dying deposition, but these are cases in which there is absolutely no doubt that the deceased had a good opportunity of knowing who the assailant was and could not have been mistaken, and at the same time there is no possible reason why he should be falsely accusing the alleged assailant; but where the recognition though possible was difficult under the circumstances, it is not quite safe to convict merely on dying deposition or assertions and denunciations by the deceased. (*Mya Bu and Baguley, JJ.*) NGA PO SI *v.* EMPEROR. **164 I.C. 139=9 R.R. 63=37 Cr.L.J. 990=1936 Cr.C. 696=A.I.R. 1936 Rang. 324.**

———S. 32 (1)—*Dying declaration—Value—Preference over first information report.*

It is safer to rely on the dying declaration rather than on the first information report, for a great sanctity is attached to the former as it is expected that the person who is on the verge of death will tell the truth. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAM DAMODAR *v.* EMPEROR. **178 I.C. 348=11 R.O. 106=1938 O.W.N. 1103=1938 A.Cr.C. 143=1938 O.A. 924=1938 A.W.R. (C.C.) 108=1938 O.L.R. 483=40 Cr.L.J. 38=A.I R. 1939 Oudh 33.**

———S. 32 (1)—*Dying declaration—Value of—Statement untrue in part—If ground for discarding whole—Corroboration—Necessity.*

A dying declaration which comes under S. 32 (1) of the Evidence Act from the point of view of admissibility, should not be put on a different footing from any other piece of evidence, so far as the appraisement of its evidentiary value is concerned. It is always a question of fact as to whether it should be relied upon or not. Merely because a part of the statement is untrue, it does not follow that the rest of the dying declaration also should be discarded and disbelieved. If a tribunal finds that a part of it is concocted, it would decline to believe the rest of it without corroboration; but the Court or the jury is not debarred from accepting the rest.

Cunliffe, J. Declarations of this type ought to be corroborated. (*Cuniffe and Henderson, JJ.*) NAIMUDDIN BISWAS *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 475=166 I.C. 625=9 R.C. 561= 38 Cr.L.J. 243=40 C.W.N. 1377=1936 Cr.C. 1129=A.I.R. 1936 Cal. 793.**

———S. 32 (1)—*Dying declaration—Value of for basing conviction—Corroboration—Necessity.*

A statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. Such a statement does not necessarily require corroboration. It is not possible to lay down any hard and fast rule as to when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the circumstances, but if the Court, after taking everything into con-

sideration, is convinced that the statement is true, it is its duty to convict notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement. (*Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, JJ.*) GURUSWAMI THEVAR, *In re.* **I.L.R. (1940) Mad. 158=187 I.C. 280=12 R.M. 720=41 Cr.L.J. 437=51 L.W. 65=1940 M.W.N. 81=A.I.R. 1940 Mad. 196=(1940) 1 M.L.J. 124 (F.B.).**

———S. 32 (1)—*Dying declaration by signs of hand and head—Duty of officer recording.*

Where a victim, in a serious condition, is unable to speak, on being questioned regarding assailants, makes a dying declaration by signs of hand and head only, the person recording the dying declaration in order that the same may be admissible in evidence must record the precise nature of the signs which the injured person is stated to have made. It is not his function to record merely his interpretation of the signs, which should be left to the tribunal. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. **173 I.C. 833=4 B.R. 342=1938 P.W.N. 266=10 R.P. 456=39 Cr.L.J. 384 =A.I.R. 1938 Pat. 153.**

———S. 32 (1)—*Statements about the transaction which resulted in death—Admissibility—Nature of the proceedings.*

Where the statements are as to the circumstances of the transaction which resulted in the death of the person making them, they are admissible under S. 32 (1), Evidence Act, in a case in which the cause of that person's death comes into question, and it is immaterial that the person who made them, was not at the time when he made them under expectation of death. The nature of the proceedings in which the death comes into question also does not matter. It need not necessarily be a proceeding on a charge of murder or homicide. It may be even a civil action. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. **1940 N.L.J. 459=A.I.R. 1940 Nag. 340.**

———S. 32 (1)—*Statement by deceased expressing mere suspicion about accused with regard to some matter not connected with the occasion of death—Admissibility—Duty of Public Prosecutor to see that inadmissible evidence is not placed before the Court.*

Under S. 32 of the Evidence Act it is only statements made by the deceased as to the cause of his death or the circumstances of the transaction that resulted in his death which can be admitted. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death cannot be admissible. Statement by the deceased which provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed a relation of his in a civil suit which are in no way associated with the actual murder cannot be admitted under S. 32 and must be excluded. Even if the accused does not object to such evidence, it must be excluded. At any rate it is the duty of Public Prosecutor to see that such wholly inadmissible evidence is not placed before the Court. (*Burn and Mockett, JJ.*) APPALANARASAYYA *v.* EMPEROR. **1940 M.W.N. 937=52 L.W. 495=(1940) 2 M.L.J. 715.**

———S. 32 (1)—*Statements long prior to death—Admissibility.*

Where the statement in question was said to have been made months before the alleged murder:

Held, that it could hardly come within the terms of S. 32 (1) of the Evidence Act. (*S.N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. **174 I.C. 36=10 R.C. 607=39 Cr.L.J. 395=66 C.L.J. 196=A.I.R. 1938 Cal. 125.**

———S. 32 (2) and (3)—*Applicability—Memorandum of property made by deceased person for own information—Statement not made in course of business and containing nothing against pecuniary interest—Admissibility.*

An isolated piece of paper or memorandum made by a person who is dead, for his own information, about his property, which is not made by him in the ordinary course of his business and which is not one of a continuous series of acts, and which contains nothing against his pecuniary interest and does not expose him to a criminal prosecution or a civil suit, is not admissible under S. 32 of the Evidence Act. (*Davis, J.C. and Weston, J.*) SABHAGIBAI *v.* PIRKASH CHAND. **I.L.R. (1940) Kar. 334=A.I.R. (1940) Sind 173.**

———Ss. 32 (2) and 34—*"Books"—Meaning of—Several sheets of paper stitched together before entries begin to be made—Entries in as to cash receipts and disbursements—Admissibility.*

The term "book" as used in Ss. 32 (2) and 34 of the Evidence Act implies a collective unity of sheets even at the time that the entries come to be made. It connotes an intention that it should serve as a permanent record. But beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A number of sheets of paper stitched into a book before the entries have begun to be made, each entry covering both the sheets, *i.e.*, the entry beginning on the left page and running on into the right page, and kept by a creditor as an account of his cash receipts and disbursements is a "book" within the meaning of Ss. 32 and 34, judged by the standards prevailing amongst Indians who keep private books of account not meant for trade purposes. Entries in such a book are admissible in evidence under S. 32 (4); and the entries to be admissible need not necessarily be against the pecuniary interests of the persons making the entries. (*Varadachariar and Mockett, JJ.*) AMBALAVANA PILLAI *v.* GOWRI AMMAL. **170 I.C. 749=10 R.M. 215=1936 M.W.N. 1274=44 L.W. 467=A.I.R. 1936 Mad. 871.**

———S. 32 (2)—*Chowhuddibandi papers of zemindary—Admissibility.*

Chowhuddibandi or boundary papers of Zemindaries were filed by the zemindars in 1799 in pursuance of a duty. They are, therefore, admissible under S. 32 (2) of the Evidence Act, the persons making the statements contained in them being dead. (*Mitter and Roxburgh, JJ.*) GODADHAR CHOWDHURY *v.* SARAT CHANDRA. **44 C.W.N. 935.**

EVIDENCE ACT (1872), S. 32.

——S. 32 (2)—*Construction—"In th course of business"*.

The expression **"in the course of business"** in S. 32 (2) of the Evidence Act, means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connection with a course of business, which suggests a series of acts of business; the section would therefore apply to an act or of acts of a simple and private nature. (*Horwill, J.*) RAMAMURTHI *v.* SUBBA RAO. **167 I.C. 30=9 R.M. 434=44 L.W. 681=A.I.R. 1937 Mad. 19.**

——S. 32 (2) and (7)—*Construction—"Statements made in the ordinary course of business"—Criminal case relating to possession of land—Report of arbitrator appointed by parties—Admissibility in subsequent suit.*

The expression "statement made in the ordinary course of business" in S. 32 (2) of the Evidence Act means a statement made during the course not of any particular transaction of an exceptional kind, but of business or professional employment, in which the deceased was ordinarily or habitually engaged. Where in a criminal case relating to possession of land the parties appointed a Mukhtear as an arbitrator and agreed to abide by his decision, and the Mukhtear accordingly made a local enquiry and submitted a report, the report of the deceased Mukher is not a statement made in the ordinary course of business and is not, therefore, admissible under S. 32 (2) in a subsequent suit betwees the parties, though it is admissible under S. 32 (7) of the Act. (*M.C. Ghose, J.*) GURU CHARAN RUDRA PAL *v.* MAFIJUDDIN MOLLA. **174 I.C. 511=10 R.C. 679=65 C.L.J. 603=A.I.R. 1938 Cal. 150.**

——S. 32 (2)—*Jama Wasil baki papers—Need for corroboration—Bengal Tenancy Act, S. 50.*

Jama Wasil taki papers, when admitted under S. 32 (2) of the Evidence Act do not necessarily require to be corroborated by other evidence. They may be used to rebut the presumption under S. 50 the Bengal Tenancy Act without corroboration. (*Khundkar, J.*) ABDUL WAHED *v.* NAGENDRA CHANDRA LAHIRI. **44 C.W.N. 993=A.I.R. 1940 Cal. 524.**

——Ss. 32 (3) and 157—*Deed not* inter partes *—Recital in as to boundary—Admissibility.*

It is well-established that a recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. This rule is subject to exceptions. Such a statement can for instance, be admitted under S. 32 (3) of the Evidence Act, when it is contained in a document against the proprietary interest of the person making it, when the executant of the document is dead. So also when the executant of the document containing the recital as to boundary is himself a witness in the case, it can be admitted as a contemporaneous statement to corroborate his evidence under S. 157 of the Evidence Act. (*Wadsworth, J.*) THYAGARAJAN CHETTY *v.* NARAYANA THEVAN. **1940 M.W.N. 80=51 L.W. 509=A.I.R. 1940 Mad. 450.**

——S. 32 (3)—*Part of statement against pecuniary interest—Entire statement, if admissible.*

Where a part of a statement is against the pecuniary or proprietary interest of the person making it within the meaning of S. 32 (3) of the Evidence Act, and the rest of the statement is necessary to explain the part which is against interest, the statement as a whole would be admissible. Where during a quarrel between a husband and wife, the wife stated "I have mortgaged this property because I purchased it out of my own ornaments given to me by my father at the time of my marriage.":

Held, that the statement that she mortgaged the property was a statement against her pecuniary or proprietary interest, that the rest of the statement explained how it became possible for her to create the mortgage, and that, therefore, the entire statement was admissible in evidence. (*Khundkar, J.*) SISIR KUMAR SAHA *v.* JOGNESWAR SAHA. **42 C.W.N. 359.**

——S. 32 (3)—*Statements against interest in cancelled will—Admissibility.*

Where in a cancelled will the testator has made a statement in the interests of other persons, his sons, against his own interest, it is admissibe under S. 32 (3) of the Evidence Act. (*Stone, C.J. and Bose,*) JAGANNATH PRASAD *v.* B.K. RAI. **1939 N.L.J. 421=A.I.R. 1939 Nag. 274=185 I.C. 210=12 R.N. 141.**

——S. 32 (3)—*Statement against interest—Meaning of—Test.*

The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely it was against his interest does not afford much guarantee of its truth. (*Davis, J.C. and Weston, J.*) HOLLARAM *v* DWARKADAS. **I.L.R. (1939) Kar. 573=183 I.C. 67=12 R.S. 41=A.I.R. 1939 Sind 145.**

——S. 32 (3)—*Statement against interest—Member of Hindu family resident in Bengal—Statement by him that he is governed by Mitakshara—Admissibility.*

A statement by a deceased member of an undivided Hindu family resident in Bengal that he is governed by the Mitkashara school of Hindu Law is admissible in evidence under S. 32 (3) of the Evidence Act, being a statement against his proprietary interest in properties possessed by him. It necessarily implies that his rights were limited by the rights of the other coparceners and that he had not the free and unrestricted power of disposal. (*Mitter, J.*) SUKDEB CHARAN JANA *v.* MRITUNJOY PAL. **43 C.W.N. 395.**

——S. 32 (3)—*Statement, if against interest —How determined.*

Under S. 32 (3) of the Evidence Act, in order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. An assertion in a deed of gift by the donor that the subject-matter of the gift is his property can by no stretch of reasoning be held to be a statement against the pecuniary or proprietary interest of the donor. (*Harries, C.J. and Fazl Ali, J.*) MARKHU MAHTO *v.* SAHARAI MAHTO. **6 B.R.**

sideration, is convinced that the statement is true, it is its duty to convict notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement. (*Leach, C.J., Lakshmana Rao and Krishnaswami Ayyangar, JJ.*) GURUSWAMI THEVAR, *In re.* **I.L.R. (1940) Mad. 158=187 I.C. 280=12 R.M. 720=41 Cr.L.J. 437=51 L.W. 65=1940 M.W.N. 81=A.I.R. 1940 Mad. 196=(1940) 1 M.L.J. 124 (F.B.).**

———S. 32 (1)—*Dying declaration by signs of hand and head—Duty of officer recording.*

Where a victim, in a serious condition, is unable to speak, on being questioned regarding assailants, makes a dying declaration by signs of hand and head only, the person recording the dying declaration in order that the same may be admissible in evidence must record the precise nature of the signs which the injured person is stated to have made. It is not his function to record merely his interpretation of the signs, which should be left to the tribunal. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. **173 I.C. 833=4 B.R. 342=1938 P.W.N. 266=10 R.P. 456=39 Cr.L.J. 384 =A.I.R. 1938 Pat. 153.**

———S. 32 (1)—*Statements about the transaction which resulted in death—Admissibility—Nature of the proceedings.*

Where the statements are as to the circumstances of the transaction which resulted in the death of the person making them, they are admissible under S. 32 (1), Evidence Act, in a case in which the cause of that person's death comes into question, and it is immaterial that the person who made them, was not at the time when he made them under expectation of death. The nature of the proceedings in which the death comes into question also does not matter. It need not necessarily be a proceeding on a charge of murder or homicide. It may be even a civil action. (*Gruer and Puranik, JJ.*) PARAMANAND *v.* EMPEROR. **1940 N.L.J. 459=A.I.R. 1940 Nag. 340.**

———S. 32 (1)—*Statement by deceased expressing mere suspicion about accused with regard to some matter not connected with the occasion of death—Admissibility—Duty of Public Prosecutor to see that inadmissible evidence is not placed before the Court.*

Under S. 32 of the Evidence Act it is only statements made by the deceased as to the cause of his death or the circumstances of the transaction that resulted in his death which can be admitted. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death cannot be admissible. Statement by the deceased which provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed a relation of his in a civil suit which are in no way associated with the actual murder cannot be admitted under S. 32 and must be excluded. Even if the accused does not object to such evidence, it must be excluded. At any rate it is the duty of Public Prosecutor to see that such wholly inadmissible evidence is not placed before the Court. (*Burn and Mockett, JJ.*) APPALANARASAYYA *v.*

EMPEROR. **1940 M.W.N. 937=52 L.W. 495=(1940) 2 M.L.J. 715.**

———S. 32 (1)—*Statements long prior to death—Admissibility.*

Where the statement in question was said to have been made months before the alleged murder:

Held, that it could hardly come within the terms of S. 32 (1) of the Evidence Act. (*S.N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. **174 I.C. 36=10 R.C. 607=39 Cr.L.J. 395=66 C.L.J. 196=A.I.R. 1938 Cal. 125.**

———S. 32 (2) and (3)—*Applicability—Memorandum of property made by deceased person for own information—Statement not made in course of business and containing nothing against pecuniary interest—Admissibility.*

An isolated piece of paper or memorandum made by a person who is dead, for his own information, about his property, which is not made by him in the ordinary course of his business and which is not one of a continuous series of acts, and which contains nothing against his pecuniary interest and does not expose him to a criminal prosecution or a civil suit, is not admissible under S. 32 of the Evidence Act. (*Davis, J.C. and Weston, J.*) SABHAGIBAI *v.* PIRKASH CHAND. **I.L.R. (1940) Kar. 334=A.I.R. (1940) Sind 173.**

———Ss. 32 (2) and 34—*"Books"—Meaning of—Several sheets of paper stitched together before entries begin to be made—Entries in as to cash receipts and disbursements—Admissibility.*

The term "book" as used in Ss. 32 (2) and 34 of the Evidence Act implies a collective unity of sheets even at the time that the entries come to be made. It connotes an intention that it should serve as a permanent record. But beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A number of sheets of paper stitched into a book before the entries have begun to be made, each entry covering both the sheets, *i.e.*, the entry beginning on the left page and running on into the right page, and kept by a creditor as an account of his cash receipts and disbursements is a "book" within the meaning of Ss. 32 and 34, judged by the standards prevailing amongst Indians who keep private books of account not meant for trade purposes. Entries in such a book are admissible in evidence under S. 32 (4); and the entries to be admissible need not necessarily be against the pecuniary interests of the persons making the entries. (*Varadachariar and Mockett, JJ.*) AMBALAVANA PILLAI *v.* GOWRI AMMAL. **170 I.C. 749=10 R.M. 215=1936 M.W.N. 1274=44 L.W. 467=A.I.R. 1936 Mad. 871.**

———S. 32 (2)—*Chowhuddibandi papers of zemindary—Admissibility.*

Chowhuddibandi or boundary papers of Zemindaries were filed by the zemindars in 1799 in pursuance of a duty. They are, therefore, admissible under S. 32 (2) of the Evidence Act, the persons making the statements contained in them being dead. (*Mitter and Roxburgh, JJ.*) GODADHAR CHOWDHURY *v.* SARAT CHANDRA. **44 C.W.N. 935.**

EVIDENCE ACT (1872), S. 32.

——Ss. 32 (5) and (6) and 90—*Pandah's bahis—When admissible.*

Pandah's bahis are admissible under S. 32 (5) and (6) and S. 90 only if evidence is led to prove the identity, signature and handwriting of the writer. The mere fact that such bahi is old is no justification for admitting it either under S. 32 (5) and (6) or under S. 90. (*Din Mohammad, J.*) MT. NANHI *v.* BADLU. **A.I.R. 1940 Lah. 245.**

——Ss. 32 (5) and (6)—*Pedigree—Admissibility—Conditions of.*

Before a pedigree or table of relationship can be admitted in evidence, it must be shown that it is a statement made by a person having special means of knowledge and made before the question in dispute had arisen. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) NANJUNDEGOWDA *v.* MUDDAPPA. **16 Mys.L.J. 137=43 Mys.H.C.R. 21.**

——Ss. 32 (5) and (6) and 50--*Prohit's statement regarding relationship—When admissible.*

A prohit's statement regarding relationship is admissible only if it comes within the four corners of S. 32 (5) and (6) or under S. 50 of the Act. (*Din Mohammad, J.*) MT. NANHI *v.* BADLU. **A.I.R. 1940 Lah. 245.**

——S. 32 (5)—*Proof of statements—Duty of Court.*

Witnesses should not be permitted by Court to give their testimony as to matters which could not be within their own knowledge without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirement that the person making the statement had special means of knowledge. (*Sir George Rankin.*) LAKSHMI REDDI *v.* VENKATA REDDI. **31 S.L.R. 575=39 Bom.L.R. 1005=39 P.L.R. 540=18 Pat.L.T. 471=9 R.P.C. 329=46 L.W. 88=3 B,R. 562=168 I.C. 881=1937 A.W.R. 1010=1937 M.W.N. 1271=1937 O.L.R. 356=1937 P.W.N. 547=1937 A.L.R. 500=1937 O.W.N. 724=A.I.R. 1937 P.C. 201 (P.C.).**

——S. 32 (5)—*Relationship by adoption—Evidence of incidents bearing on adoption—Admissibility.*

Where the relationship created by adoption is of such importance and specifically included in the Act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed, subject of course, to careful scrutiny as to value. (*Ameer Ali, J.*) HARIDAS CHATTERJEE *v.* MANMATHA NATH. **160 I.C. 332=8 R.C. 423=A.I.R. 1936 Cal. 1.**

——S. 32 (5)—*Scope—Statement as to relationship by person having special means of knowledge made in prior suit—Admissibility in later suit.*

K, the adopted son of *S*, died leaving a widow *V* (the 1st defendant). In a prior suit by *V* against *S*, the latter made an averment in the written statement to the effect that *K* was understood to have taken a boy *N*, "son of *L*, who is gnati and a cousin brother," of *K* in adoption. *S* died pending the suit, and the present plaintiff was brought on the record as the legal representative as a legatee under the will of *S*. He adopted the written statement of *S* in that suit. Plaintiff brought the present suit as a next reversioner to the estate of *K*, against *K* and others for a declaration that a certain sale deed executed by the 2nd defendant (father of the 1st defendant) as her agent was not binding on him and the other reversioners. The statement made by *S* in the prior suit and adopted by the plaintiff was sought to be admitted in evidence on the question whether the plaintiff was a next reversioner or whether there were nearer reversioners than the plaintiff.

Held, that the statement made by the plaintiff in the prior suit adopting the statement of *S* was made by him as a legatee under the will of *S*, and hence was not admissible in the present suit brought by him as a next reversioner, but that the statement of *S* in the prior suit was admissible under S. 32 (5) of the Evidence Act, as *S* was a person having special means of knowledge, and it was made *ante litem motam* so far as *L* being a gnati of *K* was concerned. (*Venkataramana Rao, J.*) CHENDIKAMBA *v.* VISWANATHAMAYYA. **189 I.C. 325=13 R.M. 250=1939 M.W.N. 275=49 L.W. 273=A.I.R. 1939 Mad. 446=(1939) 1 M.L.J. 227**

——S. 32 (5) and (7)—*Statement as to status in will by deceased—Relevancy of.*

A mere statement in a will as to status made by a person who is dead and not relating to any transaction does not fall within Cl. (7), S. 32. Nor can it fall under Cl. (5) which relates only to statements as to relatinship by blood, adoption or marriage. (*Davies, J.C. and Weston, J.*) HOLLARAM *v.* DWARKADAS. **I.L.R. (1939) Kar. 573=183 I.C. 67=12 R.S. 41=A.I.R. 1939 Sind 145.**

——S. 32 (5)—*Statement of deceased as to approximate date of birth of his son—Admissibility.*

A statement made by a deceased person as a witness in a prior suit as to the approximate date of birth of his son is admissible under S. 32 (5) of the Evidence Act as a statement of a person having special means of knowledge relating to the existence of relationship by blood. 43 I.A. 256, Rel. on. (*Nanavutty and Zia-ul-Hassan, JJ.*) ABDUL SUBHAN KHAN *v.* NUSRAT ALI KHAN. **165 I.C. 523=9 R.O. 223=12 Luck. 606=1936 O.W.N. 1167=1936 O.L.R. 658=A.I.R. 1937 Oudh 170.**

——S. 32 (5)—*Statements regarding relationship—Admissibility.*

Statements with regard to relationship made in the settlement proceedings at a time when the title to a portion of a taluka was under enquiry, are not admissible in evidence in a subsequent litigation not *inter partes* in which the same questions are matters of controversy as the dispute had arisen at the time when the statements were made. (*Thomas, J.*) MATA BAKHSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

——S. 32 (5)—*Statement under—Conditions of admissibility—Statement if should be relevant to matter in respect of which it is made—Extrajudicial statement—Admissibility of.*

S. 32 (5) of the Evidence Act only requires that the statement tendered in order to be ad-

missible under it, must be one made by a person who had special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. These are the only two pre-requisites to the admission of the statement. It is not further necessary that the statement in question should also be relevant to the matter in issue in respect of which it was made. It is also immaterial whether it was made in a judicial proceeding or otherwise. (*Sir Shadi Lal.*) BIRO *v.* ATMA RAM. **64 I.A. 92=167 I.C. 346=9 R, P.C. 209=1937 O.W.N. 302=45 L.W. 451=1937 M.W.N. 424=41 C.W.N. 645=65 C. L.J. 309=1937 A.L.R. 280=31 S.L.R. 262=1937 P.W.N. 314=1937 A.L.J. 462=1937 O. L.R. 164=18 Pat.L.T. 377=3 B.R. 407=39 P.L.R. 429=1937 A.W.R. 344=39 Bom.L, R. 726=A.I.R. 1937 P.C. 101=(1937) 1 M, L.J. 646 (P.C.).**

——**S. 32 (6)**—*"Pedigree"—Meaning of.*

As ordinarily understood, a pedigree is an ancient family record handed down from generation to generation and added to, as a member of the family dies or is born; but a statement drawn upon a particular occasion, for a specific purpose, by a member of the family, is not a pedigree in the sense in which it is used in S. 32 (6) of the Evidence Act, and has to be treated as a mere declaration made by the person who made or adopted it. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) NANJUNDEGOWDA *v.* MUDAPPA. **16 Mys. L.J. 137=43 Mys.H.C.R. 21.**

——**S. 32 (6)**—*Pedigree—Uniformity in several pedigrees—Presumption.*

Where there are a number of pedigrees put in by the direct ancestors of parties to the case and they are always the same, a fact which cannot be due to chance. There is a design in the way they are prepared and that design can only have been to give the correct order. (*Hamilton, J.*) JADUNATH SINGH *v.* BISHESHAR SINGH. **178 I.C. 950=1938 O.W.N. 1267=11 R.O. 127=1939 O.A. 2=1938 O.L.R. 527=A.I.R. 1939 Oudh 17.**

——**S. 32 (7)**—*Applicability—Will of Hindu coparcener—Statement that properties are self-acquired—Admissibility to prove character of properties.*

Statements of facts contained in a will executed by a Hindu coparcener to the effect that the properties dealt with in the will are his self-acquired properties are admissible in evidence under S. 32 (7) of the Evidence Act, to prove the character of the properties. But being a self serving statement it will require and justify scrutiny in the light of other evidence in the case. (*Varadachariar and King, JJ.*) VENKATARAMAYYA *v.* SESHAMMA. **I.L.R. (1937) Mad. 1012=1937 M.W.N. 309=170 I.C. 107=10 R.M. 133=45 L.W. 422=A.I.R. 1937 Mad. 538.**

——**S. 32 (7)**—*Relevancy of document—Considerations.*

Where there is no evidence entitling certain documents to be admitted under S. 32, the documents cannot be considered as relevant under S. 32 (7). (*Wort, J.*) SURPAT SINGH *v.* GENA JHA. **162 I.C. 999=8 R.P. 608=A.I.R. 1936 Pat. 315.**

——**S. 32 (7)**—Scope—Will—Statement as to age of testator written by scribe at the instance of persons present at the time—Statement not made by testator — Relevancy to prove age of testator. *See* WILL—VALIDITY. **52 L.W. 440.**

——**S. 32 (7)**—*Statement as to separation among brothers—Admissibility to prove separation.*

A statement of a deceased person contained in a deed of family settlement to the effect that after the death of his father a partition was effected amongst the brothers is a statement which is not admissible in evidence under S. 32 (7) of the Evidence Act or under any other provisions of that Act to prove separation. This statement is obviously in the interest of the person who made it, and he, if alive, could not have made use of such an admission in his favour nor could his sons do so. (*Nanavutty and Smith, JJ.*) RAJ NARAIN *v.* MAHARAJ NARAIN. **165 I.C. 785=9 R.O. 252=1936 O.L.R. 705=1936 O.W.N. 1203=A.I.R. 1937 Oudh 133.**

——**S. 33**—*Admission of deposition under—Bare statement—If sufficient.*

Where the deposition of a witness is recorded by a committing Court and is presumably admitted under S. 33 but there is nothing on record to show that such evidence comes within the terms of S. 33, the bare statement that the deposition is admitted under S. 33 is not sufficient to bring such evidence within the terms of S. 33. (*Sharpe, J.*) NGA CHIT TIN *v.* THE KING. **183 I.C. 145=40 Cr.L.J. 725=12 R.R. 45=A.I.R. 1939 Rang. 225.**

——**S. 33**—*Applicability—Evidence of witness in prior proceeding—Admissibility in later proceeding—Conditions—Specific issues on point—Necessity.*

Under S. 33 of the Evidence Act before a certain evidence given by a witness in a judicial proceeding can be admitted in a subsequent judicial proceeding, it must be established that the questions in issue were substantially the same in the first as in the second proceeding. It is not necessary however, that any specific issue need have been raised regarding any particular matter in issue between the parties, but the matter must have been in issue between them. (*Venkataramana Rao, J.*) CHENDIKAMBA *v.* VISWANATHAMAYYA. **189 I.C. 325=13 R.M. 250=49 L.W. 273=1939 M.W.N. 275=A.I.R. 1939 Mad. 446=(1939) 1 M.L.J. 227.**

——**S. 33**—*Evidence of person whose presence cannot be secured—Admissibility—Duty of Court to record finding.*

Before the evidence of a person who cannot be found can be admitted under S. 33, Evidence Act, there must be a finding by the Court that reasonable exertion had been made to find him. The mere report of the process-server that the witness cannot be traced is insufficient for enabling the Court to base its finding upon such evidence. (*Nawal Kishore, C.J. and Ranjitmal, J.*) MALIA *v.* SARKAR. **1939 M.L.R. 12 (Cr.).**

——**S. 33, Proviso**—*"Between the same parties or their representatives-in-interest"—Meaning of.*

The term "representatives-in-interest" in the proviso to S. 33 of the Evidence Act would in-

clude persons who have derived title from another. It also includes persons having the same interest in the subject-matter of the litigation and comprises all persons on whose behalf, though not in their names or as representing them, the previous litigation was carried on. In other words, all persons whose rights are litigated *bona fide* by a person virtually on behalf of a class, though they themselves are not *co-nominees* on the record, will be considered in the eye of law as representatives-in-interest of the previous litigant. (*Shankaranarayana Rao and Nageswara Iyer, JJ.*) NARASIMHACHAR *v.* RAMASWAMY IYENGAR. **16 Mys.L.J. 77=43 Mys.H.C.R. 113.**

———**S. 34**—*Account books—Entries in—Sufficiency by themselves—Need for corroboration.*

Under S. 34 of the Evidence Act entries in books of account regularly kept in the course of business are relevant, but they are not by themselves sufficient evidence to charge any person with liability. It is the obvious duty of the person relying on such entries to produce corroborative evidence in support of such entries. Any relevant fact which can be treated as evidence within the meaning of the Act would be sufficient corroborative evidence furnished by the entries in books of account if true. (*Ismail, J.*) NARAIN DAS *v.* GHAZI RAM GOJAR MAL. **176 I.C. 99=1938 A.L.R. 543=11 R.A. 40=1938 A.L.J. 449=1938 A.W.R. (H.C.) 294=A.I.R. 1938 All. 353.**

———**S. 34**—*Accounts* — Rokar bahi—*Blank spaces left in different places—Evidentiary value.*

Where a number of blank spaces are left in the *rokar bahi* in different places, the conclusion by the Court that it is unreliable is fully justified. (*Addison and Abdul Rashid, JJ.*) CHARAN DASS *v.* LAL CHAND. **184 I.C. 858=12 R.L. 261=41 P.L.R. 295=A.I.R. 1939 Lah. 412.**

———**S. 34**—*Accounts not regularly kept—Entries, true and correct—Corroborative evidence.*

Accounts not regularly kept, though not admissible under S. 34 of the Evidence Act, are admissible to corroborate oral evidence, if the entries are true and correct. (*King, C.J. and Thomas, J.*) JUNGU SINGH *v.* JOT SINGH. **1936 R.D. 275=1936 O.W.N. 582.**

———**S. 34**—*Bahi entries—Presumption.*

There is no presumption of correctness attaching to the entries in the *bahis*. (*Addison and Ram Lall, JJ.*) AHMAD DIN ALLAH DITTA *v.* PARTAP SINGH. **41 P.L.R. 373=A.I.R. 1939 Lah. 438.**

———**S. 34**—*Books of account—Admissibility—If can establish liability.*

The account books produced by a party to show payment of rent by other party is admissible under S. 34. Evidence Act, though they cannot by themselves make the other party liable. (*Zia-ul-Hasan and Yorke, JJ.*) LAL CHANDRA MOOL SINGH *v.* TEJ BAHADUR SINGH. **189 I.C. 52=1940 O.A. 528=13 R.O. 34=1940 O.L.R. 406=1940 O.W.N. 555=A.I.R. 1940 Oudh 385.**

———**S. 34**—*Entries in books of account—Value of.*

The rule that plaintiff's own statement on oath in support of entries can be sufficient to support the entries in his Bahies so as to fix the defendant with liability is applicable only if it is found that the plaintiff's books are regularly kept in the course of business and free from any doubt. It is essential that entries of all the available Bahies, (*e.g.*) Rokar, Pakki and Kachi, Nakal and Khata relating to the money claimed should be filed along with the plaint. The tendency on the part of creditors to base their claim solely on entries in Khata Bahi is to be strongly deprecated. (*Ranjitmal, J.*) PUKHRAJ *v.* GANESHMAL. **1939 Mar. L.R. 216 (Civ.).**

———**S. 34**—*Scope and effect—Proof of accounts—Mere production—Sufficiency.*

Under S. 34, Evidence Act, the production of account books alone is not enough to make a person liable. But it is a question of fact as to how much evidence is required to create the liability when taken together with the books of account. Every case shall have to be decided on its own merits. In a case where the witness who produces the account books, is reliable and has personal knowledge, the Court may accept his statement as enough proof combined with the books of account. In cases however in which the witness is not reliable at all, the Court would require more proof. (*Almond J.C. and Mir Ahmad, A.J.C.*) KHUDA BUKSH NUR ILAHI *v.* YASIN. **172 I.C. 598=10 R. Pesh. 43=A.I.R. 1937 Pesh. 103.**

———**S. 34**—Zemindari papers—Statements in—Relevancy and admissibility. *See* EVIDENCE ACT, SS. 21 AND 34. **19 Pat. 398.**

———**S. 35**—*Entries in revenue record showing certain land to be thoroughfare—Relevancy.*

Entries in revenue records showing certain land to be a thoroughfare, although not entitled to presumption under S. 44, Punjab Land Revenue Act, can be considered as relevant under S. 35, Evidence Act, for the purpose of showing that the land in dispute was used as a thoroughfare when the entries were made. (*Bhide, J.*) MEGH RAJ *v.* MUNICIPAL COMMITTEE, ABOHAR. **167 I.C. 524=9 R.L. 503=38 P.L.R. 1169=A.I.R. 1936 Lah. 921.**

———**S. 35**—*Family traditions recorded by Settlement Officer—Evidendiary value.*

Where family traditions were recorded by a Settlement officer mostly as they were stated by a person representing a Talukdar, no value can be attached to such traditions if it is not shown that that person had either obtained information from persons, who had special means of knowledge in this respect, or was a member of the family and himself possessed of such means. (*Thomas, J.*) MATA BAKHSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

———**S. 35**—Applicability—Public or other official book, register or record—Register of information of pargana watandars—Relevancy of. *See* EVIDENCE ACT, S. 74. **39 Bom.L.R. 288.**

———**S. 35**—*Batwara* Khasras—*Admissibility.*

Batwara *Khasras* showing certain lands as raiyati lands are admissible in evidence show previously the history of lands. (*Wort and Fazl Ali, JJ.*) KALI SINGH *v.* MATRU SINGH. **15 Pat. 584=167 I.C. 781=9 R.P. 435=3 B.R. 346=1936 P.W.N. 791=A.I.R. 1937 Pat. 189.**

EVIDENCE ACT (1872), S. 35.

———**S. 35**—*Birth and Death Register—Copy of entry in—Admissibility.*

Where the copy produced is that of an entry in the register of births and deaths kept by the Circle Registration Officer under para. 306 of the Police Regulations, it is a copy obtained from a public office and is a copy of a public document within the terms of the Evidence Act and is hence admissible in evidence. (*Harper, J.M.*) GOTA *v.* KANTI PRASAD. **1940 R.D. 6=1940 A.W.R. (B.R.) 15=1940 A.L.J. (Supp.) 1.**

———**S. 35**—*Birth and death register—Entry in —Relevancy and admissibility.*

S. 35 of the Evidence Act makes the entries in the birth and death register a perfectly relevant and admissible piece of evidence. (*Mehta, S.M. and Harper, J.M.*) RAM DULAR TELI *v.* RAJ BAHADUR SINGH. **1939 A.W.R. (B.R.) 4=1939 R.D. 80.**

———**S. 35**—*Birth and Death Register—Entry of birth or death signed by father or his servant or relation—Value of—Inference of legitimacy of child—If justified—Acknowledment of legitimacy.*

When a man speaks of a child born to him what he means ordinarily is that the child was born legitimately and not illegitimately. Entries in the register of births and deaths about the birth of children to a person or the death of his child, signed by himself or by his servants or relations, justify the conclusion that children must have been legitimately born and in lawful wedlock. An acknowledgment made under the father's signature in a public register like the birth register shows that his intention was not merely to acknowledge the paternity of the child but also the legitimacy of the child. (*Pandrang Row and Venkataramana Rao, JJ.*) MUHAMMAD EBRAHIM *v.* SAFIA BAI. **1937 M.W.N. 1282.**

———**S. 35**—*Copies of Shajra and Khasra of Municipal Committee—Admissibility.*

The copies of Shajra and Khasra of the Municipal Committee are documents falling under S. 35 of the Evidence Act having been prepared by the employees of the Municipal Committee in the discharge of their official duties. Such documents are, therefore, admissible in evidence, although no presumption of correctness attaches to them. (*Addison and Din Mohammad, JJ.*) JASSA RAM *v.* PURAN BHAGAT. **181 I.C. 52=11 R.L. 738=40 P.L.R. 693=A.I.R. 1938 Lah. 440.**

———**S. 35**—*Documents containing opinion of Government officers who held no personal inquiries—Admissibility.*

The documents consisting of mere opinions expressed in Secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter are inadmissible in evidence. (*Addison, A.C.J. and Din Mahomed, J.*) GHULAM MAHOMMED KHAN *v.* SAMUNDAR KHAN. **165 I.C. 626=9 R.L. 267 (2)=38 P.L.R. 748=A.I.R. 1936 Lah. 37.**

———**Ss. 35 and 32 (5)**—*Entry as to age in High School registers—Admissibility—S. 32 (5) if affects the question.*

The entries as to the age of pupils in the High School registers though they might have been merely copied from the Secondary School registers, are admissible under S. 35 of the Evidence Act, as entries made by a public servant in a public or official register in the discharge of his official duty. Whether he had any special means of knowledge so as to make the entry relevant under S. 32 (5) of the Act does not affect the admissibility of the entry under S. 35 though it may affect its value. S. 35 stands by itself independently of S. 32 (5). (*Pollock, J.*) AGA JAN KHAN *v.* KESHEO RAO. **186 I.C. 613=12 R.N. 230=1940 N.L.J. 150=A.I.R. 1940 Nag. 217.**

———**S. 35**—*Entry in, as to age in school register—Value of.*

Entries in school registers are of little value as evidence of age. (*Monroe, J.*) ASA NAND *v.* GIAN CHAND. **164 I.C. 751 (1)=9 R.L. 161=38 P.L.R. 69 (1)=A.I.R. 1936 Lah. 598.**

———**S. 35**—*Entries in public records consequent upon decree—Admissibility.*

Entries in public records consequent upon a decree are admissible under S. 35 of the Evidence Act. (*Sir George Rankin.*) KESHO PRASAD SINGH *v.* BAHURIA. **16 Pat. 258=18 Pat.L.T. 257=1937 O.W.N. 396=1937 R.D. 178=9 R.P.C. 199=1937 A.W.R. 459=41 C.W.N. 577=45 L.W. 580=1937 P.W.N. 290=1937 O.L.R. 151=31 S.L.R. 242=1937 A.L.J. 638=65 C.L.J. 241=1937 M.W.N. 593=1937 A.L.R. 252=39 Bom.L.R. 731=3 B.R. 368=167 I.C. 329=A.I.R. 1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.).**

———**S. 35**—*Entry in Register of Powers-of-attorney—Admissibility and value.*

An entry in the Register of Powers-of-attorney maintained by the Registering officer under the Registration Act, is undoubtedly relevant under S. 35 of the Evidence Act to prove the contents of the power of attorney. The abstract of the power which appears in the entry is made by the Sub-Registrar in the discharge of his official duty, and the Court is entitled to presume its correctness in accordance with the usual presumption that official acts are regularly performed. (*Mitter and Rau, JJ.*) PATTU KUMARI *v.* NIRMAL KUMAR. **185 I.C. 691=12 R.C. 392=43 C.W.N. 907=70 C.L.J. 5=A.I.R. 1939 Cal. 569.**

———**S. 35**—*Interpretation of—Letters passing between officials before final decision is reached —Admissibility.*

The very wording of S. 35 conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character; and in so far as they do not incorporate the result of personal inquiries they are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which

constitute the final word in the matter. Hence letters which have passed between the various officials cannot be admitted under S. 35 so as to make the remarks made therein as legal evidence in the case; and if the final conclusions arrived at are recorded in the settlement papers those are the only documents which can be admitted in evidence. (*Addison, A.C.J. and Din Mahomed, J.*) GHULAM MAHOMED KHAN *v.* SAMUNDAR KHAN. **165 I.C. 626=9 R.L. 267 (2)=38 P.L.R. 748=A.I.R. 1936 Lah. 37.**

———**S. 35**—*Khanapuri officer—Decision is settlement proceedings—Admission of parties contained in—Admissibility.*

In a suit to eject the defendants on the allegation that they were under-raiyats of the plaintiff, the defendants pleaded that they were not under-raiyats but co-sharers with the plaintiff. The Court accepted the defence and dismissed the suit relying on a decision of the Khanapuri officer in the course of the settlement which took place some years ago. In those proceedings one of the plaintiffs in the suit who was acting on behalf of all the co-sharers, was stated in the decision of the Khanapuri officer to have admitted before him that the predecessors. in-interest of the defendants were co-sharers. In appeal, the plaintiffs challenged the admission contained in the decision of the Khanapuri officer as inadmissible.

Held, that the decision of Khanapuri officer was admissible in evidence for the purpose of proving the admission in question, and that the decision of the lower Court could not be challenged as being based on inadmissible evidence. (*Agarwala, J.*) KHEDU MAHTO *v.* KHONKA MAHTO. **185 I.C. 254=12 R.P. 330=1939 P.W.N. 700=20 Pat.L.T. 929=6 B.R. 142=A.I.R. 1939 Pat. 591.**

———**S. 35**—Khasra Pamaish—*Admissibility*

A *Khasra Pamaish* prepared under the orders of Government is relevant under S. 35 of the Evidence Act. (*Bhide, J.*) PARTAP SINGH *v.* GANESH DAS BHATIA. **179 I.C. 262=11 R.L. 549=40 P.L.R. 298=A.I.R. 1938 Lah. 751.**

———**Ss. 35 and 79**—*Municipal death registers—Admissibility—Correctness of copies — Presumption—Object of such registers.*

The death register maintained under S. 298, (2), Cl. (*j*) (*b*) of U.P. Municipalities Act are admissible in evidence under S. 35 of the Evidence Act. The correctness of the copies has to be presumed under S. 79 of the Evidence Act. The object of maintaining such a register is to keep a fairly full record of the person whose death is reported. (*Collister and Bajpai, JJ.*) KOMAL *v.* GUR CHARAN PRASAD. **175 I.C. 263=10 R.A. 661=1938 A.L.R. 392=1938 A.W.R. (H.C.) 168=1938 A.L.J. 235=A.I.R. 1938 All. 242.**

———**S. 35**—*Municipal Register of Births and Deaths—Copy defective in some particulars — Admissibility.*

Under S. 35, Evidence Act, Municipal Register of Births and Deaths is admissible in evidence as it is kept by a public servant in the discharge of his duty. And because of the defect that the copy shows that the entry is not exactly in the prescribed form inasmuch as the name of the reporter and the signature of the recording officer are not given, the entry does not become inadmissible. A.I.R. 1925 All. 79 and A.I.R. 1934 Oudh 167, Rel. on. (*Bajpai, J.*) MT. ANWARI JAN *v.* BALDUA. **159 I.C. 190=8 R.A. 403=1935 A.W.R. 1248=1935 All. L.R. 1082=1936 A.L.J. 404=A.I.R. 1936 All. 218.**

———**S. 35**—*Municipal register of* tharas *and* khanasumari—*Admissibility to prove ownership of wells.*

Municipal registers of *tharas* and *khanasumari* are not admissible under S. 35 of the Evidence Act or any other provision of law for the purpose of proving the ownership of a well, when it has not been shown that there was any statutory obligation on the officials who had prepared these registers to make enquiries as to the ownership of wells. (*Tek Chand, J.*) MAGAN NATH *v.* HARBANS SINGH. **163 I.C. 817=9 R.L. 52=A.I.R. 1936 Lah. 965.**

———**S. 35**—*Offlcial book—Kotwar book containing entries of births and deaths in village —Entries in—Admissibility.*

The kotwar book containing entries of births and deaths in the village is an official book which the mukaddam has to maintain in accordance with C.P.Land Revenue Act and C. P. Police Manual and it is therefore an official document within the meaning of S. 35, Evidence Act. Entries made therein are therefore relevant under S. 35, Evidence Act. The admissibility in evidence of such a book is not affected even if a certain entry therein is signed by the son under the instructions and with the knowledge of his father maintaining such book. (*Niyogi and Pollock, JJ.*) SHRIKISAN BHIKAMCHAND *v.* JAGOBA MAHIPAT. **I.L.R. (1937) Nag. 382=172 I.C. 287=10 R.N. 191=20 N.L.J. 139=A.I.R. 1937 Nag. 264.**

———**S. 35**—Official book or record—Chota Nagpur tenancy—Sifton's Settlement Report—Entries in—Admissibility. *See* EVIDENCE ACT, SS. 32, 35, 48 AND 57 (13). **A.I.R. 1937 Pat. 463.**

———**S. 35**—*Official publications — Admissibility—Conversion of talukdar to Islam—Proof.*

Upon the question whether a talukdar was a convert to Islam or was a chief of a Rajput clan, it is permissible and important to prove that the fact of such conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publications. (*Sir George Rankin.*) KEOLAPATI *v.* AMAR KRISHNA NARAIN SINGH. **I.L.R. (1940) Kar. (P.C.) 1=1939 O.L.R. 553=183 I.C. 662=12 R.P.C. 73=6 B.R. 1=44 C.W.N. 66=1940 P.W.N. 32=A.I.R. 1939 P.C. 249 (P.C.).**

———**S. 35**—*Official record—Municipal* khesra *—Entries in—Relevancy as to possession and title.*

The entries made in a municipal *khesra* being entries made in an official record by public officers in the discharge of their duties are themselves relevant facts and may be considered by the Courts as evidence of possession from which the Courts may, if they think fit, draw an inference as to title, and a Court does not commit any error of law in finding possession and title on the basis of such entries. (*Rowland, J.*) JAGAN KOERI *v.* CHAIRMAN OF THE GAYA MUNI-

CIPALITY. 18 Pat.L.T. 464=171 I.C. 732=10 R.P. 251=4 B.R. 71=A.I.R. 1937 Pat. 567.

———S. 35—*'Official register'—Book of copies maintained in Collector's office containing copies of communications sent by Collector to subordinate officers—If official register or public document—Certified copy of book—Admissibility.*

A book of copies of communications sent by the Collector to various subordinate officers, maintained in the Collector's office, that being the prevalent official practice is itself an official register within the meaning of S. 35 of the Evidence Act, and a public document under S. 74. A certified copy of such a document is clearly inadmissible in evidence, and should not be rejected as being a copy of a copy. (*Varadachariar and Abdur Rahman, JJ.*) SEVUGAN CHETTIAR *v.* ZAMINDAR OF SIVAGANA. 1939 M.W.N. 841=A.I.R. 1940 Mad. 273.

———S. 35—*Pedigree prepared by Court of Wards under rules framed under the Court of Wards Act—Admissibility.*

Where a hand written pedigree is prepared under a form prescribed by rules framed under the Court of Wards Act, it is admissible in evidence under S. 35 of the Evidence Act. (*Rachhpal Singh and Bajpai, JJ.*) SHAM PRATAP SINGH *v.* BAISNI MADHO KUNWAR. 189 I.C. 757=13 R.A. 119=1940 A.W.R. (H.C.) 300=A.I.R. 1940 All. 353.

———S. 35—*Police records—Entries in village crime note book—Evidentiary value.*

Per *Gruer, J.*—Where there is an official duty cast upon any officer to make an entry in his register such entries are admissible under S. 35, Evidence Act. The village Crime Note Book is one of the registers which are prescribed for station house under the Police Manual. Therefore entries in it are admissible to prove that certain crimes were reported and registered, but of course they are no proof against persons named as suspects in them. (*Grille, J.C., Niyogi and Pollock, A.J.Cs.*) AMDUMIYAN GULJAR *v.* EMPEROR. I.L.R. (1937) Nag. 315=166 I.C. 582 and 587=9 R.N. 126 and 132=38 Cr.L.J. 237 and 251=A.I.R. 1937 Nag. 17 (F.B.).

———S. 35—*Process-server's report — Admissibility—Process-server not called as witness.*

A process-server's report of the giving of possession of property in execution is a public record of an official act, and is admissible, in evidence without his being called as a witness. (*Monroe, J.*) MST. REWTI *v.* MOHAN LAL. 42 P.L.R. 288=A.I.R. 1940 Lah. 312.

———S. 35—Record—Record of existing rents and assets of estate published under Bengal Estates Partition Act—Admissibility. *See* EVIDENCE ACT, SS. 13 AND 15. 40 C.W.N. 821.

———S. 35—*Register of rent suits—Admissibility.*

A register of rent suits would be admissible in evidence under S. 35 of the Evidence Act as written by a public servant in the discharge of his official duty. (*Akram, J.*) BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSH. 71 C.L.J. 504=A.I.R. 1940 Cal. 539.

———S. 35—*Relevancy of patta—Lease by Court of Wards—Visible indications of official act—Value, though not proved.*

Where a lease printed in the form of the Court of Wards and bearing the signature of its manager has been produced from proper custody, it is a strong piece of evidence, though it was not proved, and the patta cannot be completely ignored under S. 35 of the Evidence Act. (*Mehta, S.M. and Harper, J.M.*) MAKNU *v.* MAHOMED HUSAIN KHAN. (1939) R.D. 20=1939 A.W.R. (B.R.) 127.

———S. 35—*Revenue records—Entry made by patwari in village papers.*

An entry made a considerable time ago by the patwari in village papers, would be treated as an entry in a public document maintained in the course of business. (*Marsh, S. M. and Mehta, J. M.*) SHYAM LAL *v.* ISHWARI DAYAL. 1939 R.D. 325=1939 A.W.R. (B.R.) 277.

———S. 35—*School register—Non-Government school—Entries—Admissibility.*

An employee in a school other than a Government or a State school is not a public servant and any entry in its register made by him is not one made in a public or official register by "a public servant" in the discharge of his official duty. Hence entries in registers of schools other than Government or State schools are not admissible in evidence under S. 35. A.I.R. 1935 Oudh 41. (*Mya Bu and Mosely, J.*) HOAK SAING *v.* MA E HLA. 1940 Rang.L.R. 481=A.I.R. 1940 Rang. 191.

———S. 36—*Diara map—Presumption of correctness—Rebuttal.*

Where the diara operations extend over a very wide area and the diara map is not prepared with reference to any particular survey trijunction of certain mouzahs named, the presumption of correctness of the diara map is in no sense rebutted by the mere fact that that particular trijunction has not been located. (*M.N. Mukherjee, Ag.C.J. and S.K. Ghose, J.*) SRI GOBINDA CHAUDHURI *v.* SECRETARY OF STATE. 176 I.C. 341=11 R.C. 81=A.I.R. 1937 Cal. 574.

———Ss. 36 and 83—*Proof of maps.*

A map which is not a published map generally offered for public sale nor one made under the authority of Government, is not within S. 36 of the Evidence Act. It is on the contrary within the provisions of S 83, that maps made for the purposes of any cause must be accurate. (*Sir George Rankin.*) KESHO PRASAD SINGH *v.* BAHURIA. 16 Pat. 258=18 Pat.L.T. 257=1937 O.W.N. 396=1937 R.D. 178=9 R.P.C. 199=1937 A.W.R. 459=41 C.W.N. 577=45 L.W. 580=31 S.L.R. 242=65 C.L.J. 241=1937 M.W.N. 593=1937 A.L.R 252=39 Bom.L.R. 731=1937 P.W.N. 290=1937 O.L.R. 151=3 B.R. 368=167 I.C. 329=1937 All.L.J. 638=A.I.R. 1937 P.C. 69=(1937) 2 M.L.J. 631 (P.C.).

———S. 36—*Rennel's maps—Admissibility.*

The maps of Rennel published in 1914 were withdrawn and the sale of copies printed in 1914 were stopped under orders of Government. They are, therefore, not admissible in evidence. (*Mitter and Roxburgh, JJ.*) GADADHAR CHOWDHURY *v.* SARAT CHANDRA. 44 C.W.N. 935.

———S. 36—*Revenue Maps and surveys—Evidentiary Value.*

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons, and with such publicity and notice to persons interested as to be admissible

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and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made. 30 I.A. 44, followed. (*Syed Nasim Ali and Henderson, JJ.*) SITANATH SAHA *v.* MANORANJAN ROY. 68 C.L.J. 293=A.I.R. 1939 Cal. 148.

——S. 36—*Thak map—Evidentiary value.*

The Thak map is evidence of possession at the time when it is made and as such evidence of title. (*Syed Nasim Ali and Henderson, JJ.*) SITANATH SAHA *v.* MANORANJAN ROY. 68 C.L.J. 293=A.I.R. 1939 Cal. 148.

——Ss. 40 to 43—*Decree for confirmation of possession—Value of—If conclusive proof of actual possession—Evidentiary value of judgment.*

A decree for confirmation of possession in favour of a party cannot be regarded as conclusive proof that the party was in possession on the date of the decree. There is nothing in Ss. 40 to 43 of the Evidence Act, which would justify a Court in so holding. A judgment generally is only admissible to show its date and its legal consequences.

Obiter:—A decree for delivery of possession followed by execution, may on proof of formal delivery be treated as conclusive proof in favour of the successful party. (*James and Saunders, JJ.*) RAGHUNATH SINGH *v.* EMPEROR. 15 Pat. 336=165 I.C. 289=37 Cr.L.J. 1126=9 R.P. 165 =17 Pat.L.T. 526=3 B.R. 30=1936 Cr.C. 915 =A.I.R. 1936 Pat. 537.

——S. 40—*Scope—Owner of house in possession of Chabutra attached to house—Allegation by another that Chabutra does not belong to owner of house but is an encroachment—Burden of proof.*

Where a person owning a house is shown to have been in possession of a *Chabutra* or platform attached to the house for a number of years, the burden of proving that he has no right to it and that it is an encroachment over another's land is on the party alleging the same. (*Stone, C.J.*) PANDURANG *v.* MUNICIPAL COMMITTEE, NAGPUR. 19 N.L.J. 285.

——S. 41—*Construction and scope—Judgment in rem — Meaning and effect of — "Competent Court"—If excludes foreign Court — Foreign judgment as to validity of will—If conclusive against legatees in British India.*

No Court can pronounce a judgment *in rem* outside the state in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such state. Where the Court of a state gives a judgment affecting the status of a person domiciled within its territory, such judgment is treated by the comity of nations as analogous to a judgment *in rem*, and as such binding all the world over. The succession to the estate of a deceased person is governed by the law of his domicile; where a person domiciled in one country dies leaving assets situate in another country, the Courts of the latter country have jurisdiction to appoint a representative of the deceased in that country and to distribute the assets in that country according to the law of succession of the country of domicile, such law being ascertained in accordance with the laws of evidence, which

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usually involve the calling of expert witnesses on the subject. There is, however, no rule of law under which, by the comity of nations, the Courts of one country are bound to accept as conclusive, on a question as to its own law and in a matter upon which it is called upon to adjudicate, the judgment of a foreign Court. There is no rule of international law which requires a British Indian Court to accept the judgment of the supreme Court of His Britannic Majesty, Alexandria, as the law of domicile of a deceased, which is the domestic law of British India, as binding outside the limits of that Court's jurisdiction. S. 41 of Evidence Act cannot be read as going further than the rule of international law applicable elsewhere. The section clearly deals with what are known as judgments *in rem*, though that expression is not used in the section. The words "competent Court" in S. 41 mean the Court of any country which is competent to pass a judgment *in rem*. The Alexandria Court cannot be regarded as competent to pass a judgment *in rem* in relation to a deceased person who has died domiciled in Aden, which at the time happens to be part of British India. In respect of assets outside Egypt the judgment of the Alexandria Court can have no effect as a judgment *in rem*. "Court" in S. 41, is not restricted to a Court in British India. A foreign Court is not excluded from the operation of S. 41. Nor can such judgment have effect as a judgment *inter partes* and binding under S. 13, C.P. Code, on persons who have not been parties to the suit in that foreign Court. The question as to the validity of the will made by the deceased decided by the Alexandria Court in the suit to which the executors alone were parties can be agitated by the legatees in a suit in British India, when the legatees have not been parties to the foreign suit. Nor can the executors whose title was successfully challenged by a legatee in that suit be said to have properly represented the legatees so as to make the judgment in the suit conclusive under S. 13, C.P. Code, against the legatees in British India.

B.J. Wadia, J.—In order to be a judgment *in rem* binding on the world, there must be a finding on status which is not only the foundation of the judgment but is necessary for it. It cannot be conclusive if it relates to a matter which need not have been controverted or which was not material or which only came collaterally into question or which was only incidentally cognizable. The only judgment *in rem* as to status absolutely is the judgment pronounced not only according to the law of domicile but by the Court of domicile. (*Beaumont, C.J. and Wadia, J.*) MESSA *v.* MESSA. I.L.R. (1938) Bom. 529=177 I.C. 836= 11 R.B. 121=40 Bom.L.R. 571=A.I.R. 1938 Bom. 394.

——S. 41—*Final order of Probate Court—Meaning of—Order granting letters of administration on condition applicant executes bond—Effect of.*

The words "*final* judgment, order or decree" used in S. 41 of the Evidence Act in reference to the Probate Court means the judgment, order or decree of such a Court by which the grant is actually issued to the propounder or applicant, for it is only the grant which declares or confers the legal character on the propounder or applicant. The underlying principle is that it is the

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seal of the Probate Court, the seal affixed to the grant that prevents any person from challenging in a Court of law either the appointment of the executor or administrator or the validity of the will or its contents as appearing in the grant. An order merely granting letters of administration to the applicant with a copy of the will annexed on condition that he executes the usual bond is not a final judgment, order or decree in the above sense. That order can be relevant, if at all, under S. 11 or 13 of the Evidence Act and the Court might consider it not safe to hold on the basis of that order alone that the will has been proved in a subsequent application for letters of administration. (*Mitter and Khundkar, JJ.*) HARILAL CHATTERJEE *v.* SARAT CHANDRA CHATTERJEE. **43 C.W.N. 824.**

——**S. 41**—*Judgment* in rem—*Admiralty Court—Decision restoring certificate of officer of ship—Binding force of.*

The decision of the Admiralty Court restoring the certificate of an officer of a ship which had been suspended is a judgment *in rem* so far as the status and certificate of that officer is concerned. The decision is not binding on a person who was not a party to that suit. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S. S. ELLORA. **1940 I. L.R. Kar. 53=189 I.C. 9=13 R.S. 16=A.I.R. 1939 Sind 349.**

——**S. 41**—*Judgment* in rem—*Judgment of foreign Court declaring party to be adopted son of Hindu widow—If binding in suit relating to immovable property in British Indian Court—Rule—Jurisdiction of domicile Court.*

A foreign judgment declaring that a person is the adopted son of a Hindu widow is binding on the Courts in British India in a suit relating to immovable property in British India belonging to that widow. It is true that the judgment of the foreign Court declaring the party to be the adopted son is not a judgment *in rem* under S. 41 of the Evidence Act, but inasmuch as the Courts of British India recognize the validity of the declaration of status by a foreign Court in a matter of succession to movable property in British India because the personal law applies, the same should be recognised in the matter of succession to immovable property where the law requires the personal law to be followed. Treating the personal law as the *lex situs*, the Courts of the country of domicile are best able to decide questions of status. The comity of nations treat such a declaration by a Court affecting the status of a person domiciled within its territory as being analogous to a judgment *in rem*. (*Leach, C.J. and Madhavan Nair, J.*) NATARAJA PILLAI *v.* SUBBARAYA CHETTIAR. **I.L.R. (1939) Mad. 507=185 I.C. 677=12 R.M. 569=49 L.W. 287=1939 M.W.N. 180=A.I.R. 1939 Mad. 693=(1939) 1 M.L.J. 499.**

——**S. 41**—Judgment of foreign Court granting probate of will—Subsequent judgment revoking grant—Effect of—If judgment *in rem*. *See* C. P. CODE, S. 13. **43 L.W. 75=1936 M.W.N. 82=A.I.R. 1936 Mad. 197.**

——**S. 42**—Decision as to custom—Relevancy—Value. *See* EVIDENCE ACT, S. 13. **40 P.L.R. 29.**

——**S. 42**—*Facts in judgment—Judgment, if relevant evidence of.*

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Judgments are not under S. 42, Evidence Act, relevant evidence of the facts mentioned in them. (*Harper, S.M. and Sathe, J.M.*) AJUDHYA *v.* BUDHSEN. **1940 R.D. 402=1940 A.W.R. (B.R.) 214.**

——**Ss. 42 and 13**—Land in suit claimed to be a *takya* in prior suit—Decision in such suit—Relevancy. *See* EVIDENCE ACT, SS. 13 AND 42. **163 I. C. 924.**

——**S. 42**—*Proof of custom—Previous judgment—Admissibility.*

A previous judgment is relevant under S. 42 of the Evidence Act for the purpose of proving a custom. (*Almond, J.C.*) JAI KARAM DASS *v.* ABDUL GHAFUR KHAN. **190 I.C. 35=A.I.R. 1940 Pesh. 31.**

——**S. 43**—*Admissibility of judgments—Law as to.*

A judgment is not admissible to prove the truth of the fact which it states, nor is any fact stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. But in cases where the right of a party has already been concluded by previous judgment, that fact can be proved by the production of the judgment, since the existence of that judgment itself is relevant. (*Stone, C.J. and Clarke, J.*) MAROTI *v.* JAGANNATHDAS. **180 I.C. 118=11 R. N. 339=1938 N.L.J. 466=A.I.R. 1939 Nag. 72.**

——**S. 43**—*Decision in rent suit—Recorded rent found incorrect—Plea of fictitious rental in another suit—Admissibility of the other decision.*

Where the recorded rent has been found to be incorrect in one particular case, then in a similar case of the same tenant, where it is pleaded that the recorded rental is fictitious, the decision in the former case can be used as evidence under S. 43 of the Evidence Act. (*Bomford, S.M. and Mehta, Offg. S.M.*) MANGAL CHAND *v.* RAHAM ALI KHAN. **1939 R. D. 162=1939 A.W.R. (B.R.) 161.**

——**S. 43**—*Decision of Income-tax Officer—Finding that assessee was separate and not joint—Relevancy in civil suit.*

The decision of an Income-tax Officer holding that an assessee was separate from his joint family and had separate grain business is a mere opinion of that officer and is irrelevant in a civil suit involving a dispute as to whether a particular item of property is his separate property or joint family property. (*Bose, J.*) NANDKUMAR *v.* KALURAM. **19 N.L.J. 287.**

——**S. 43**—*Judgment in land registration proceedings—Admissibility and value of in subsequent suit not* inter partes.

A judgment in land registration proceedings is no evidence of the facts mentioned therein, more particularly when the proceedings were not between parties to a subsequent suit, in which the judgment is sought to be admitted in evidence. (*Courtney-Terrell, C.J. and James, J.*) KRISHNAKUMAR CHATTERJEE *v.* MT. JAGPAT KUER. **16 Pat.84=167 I.C. 152=9 R.P. 385=3 B.R. 272=17 Pat.L.T. 769=1936 P.W.N. 775=A.I.R. 1937 Pat. 73.**

——**S. 43**—*Judgment* inter partes—*Admissibility—Extent of.*

Where all the persons who are parties to a present case were parties to a former litigation, the judgment in the former proceedings is certainly evidence of what were the points in

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issue between the parties in that suit and of what was the result of the suit. (*James, J.*) MATBER SINGH *v.* RAI KRISHNA BAHADUR 9 R.P. 457=168 I C. 109=3 B.R. 385=1936 P.W.N. 530=A. I.R. 1937 Pat. 86.

——S. 43—*Judgment not* inter partes—*Admissibility—Extent.*

Though the recitals and findings in a judgment not *inter partes* are not admissible in evidence, such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed. (*Mitter and Roxburgh, JJ.*) GADADHAR CHOWDHURY *v.* SARAT CHANDRA. 44 C.W.N. 935.

——S. 43—Suit for malicious prosecution—Proof of reasonable and probable cause—Order of acquittal or discharge by criminal Court—Admissibility—Extent of. *See* MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE. 41 Mys. H.C.R 283.

——S. 44—*Applicability and scope—Judgment in probate suit—If can be challenged—Procedure—Separate suit—Necessity.*

S. 44 of the Evidence Act would apply n any proceeding, civil or criminal, if the decree sought to be challenged is proved by the adverse party. It cannot be said that it applies only in a suit for revocation. A judgment in a probate suit is no doubt a judgment *in rem* but it can be contested on the ground of fraud or collusion. A stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. Under S. 44, it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside; he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud. It would be open to a party offering evidence of forgery of a will to prove that the probate decree was obtained by fraud if it were set up against him by the other side, instead of admitting the probate and the title of the executor. (*Blackwell, J.*) BHAGWANDAS NARANDAS *v.* D. D. PATEL & Co. I.L.R. (1940) Bom. 403=187 I.C. 867=12 R.B. 495=41 Cr.L.J. 526=42 Bom.L.R. 231=A.I.R. 1940 Bom. 131.

——S. 44—*Principle of—If applies to cases of gross negligence.*

The principle of S. 44 cannot be extended to cases of gross negligence. 45 M.L.J. 324, Overr. (*Lord Thankerton.*) VENKATA SESHAYYA *v.* KOTISWARA RAO. 64 I.A. 17=I.L.R. (1937) Mad. 263=1937 A.W.R. 42=1937 O.W.N. 42=18 Pat. L.T. 27=41 C.W.N. 257=45 L.W. 43=166 I.C. 1=1937 M.W.N. 66=9 R.P.C. 135=1937 A.L.J. 240=39 Bom.L.R. 317=65 C.L.J. 14=1937 O. L.R. 12=1937 P.W.N. 123=1937 A.L.R. 54=3 B.R. 223=A.I.R. 1937 P.C. 1=(1937) 1 M.L.J. 113.

——S. 44—*Scope— Transaction contained in decree—Suit by individual creditor to set aside on his own account on ground of being fraudulent transaction—Maintainability.*

S. 44 of the Evidence Act does not enable an individual creditor to bring a suit for his benefit alone to set aside a transaction contained in a decree on the ground of its being a fraudulent transfer or preference. (*Kania and Wassoodew, JJ.*) ARVI CO-OPERATIVE CREDIT SOCIETY, LTD. *v.*

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DHONDIRAM NAVALCHAND. I.L.R. (1940) Bom. 526=42 Bom.L.R. 486=A.I.R. 1940 Bom. 289.

——Ss. 45 and 49—*Applicability and scope—Charge of gambling—Opinion of police officer that slips are betting slips and instruments of gaming—Relevancy and value of.*

Gambling cannot be considered to be either an act or a science within the meaning of S. 45 of the Evidence Act so as to entitle a police officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain harmless documents such as slips, which he calls betting slips are instruments of gaming. It may be that under S. 49 of the Evidence Act a police officer might give evidence that he had had a long experience amongst people who indulged in *satta* gambling in a particular district, and from that experience supported by instance which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But he is not entitled merely to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents mean. (*Beaumont, C.J. and Wadia J.*) EMPEROR *v.* HARILAL GORDHAN. I.L.R. (1937) Bom. 670=171 I.C. 282=10 R.B. 184=38 Cr.L.J. 1047=39 Bom.L.R. 613=A.I.R. 1937 Bom. 385.

——S. 45—*Disputed handwriting or signature—Opinion of expert—Value of—Duty of Court to come to its own conclusion as to genuineness of signature.*

In the case of a disputed handwriting or signature, a Court is not incompetent to use its own eyes for the purpose of deciding whether certain handwritings or signatures placed before it are similar or not. A Court should not be deprived of the function for which it exists, namely, of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence, but the opinion of the Judge is the decision in the case. A Judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of the case. If the Court looks at the disputed signatures taking the assistance of expert evidence and comes to its own conclusion with regard to the genuineness or otherwise of the signatures, it cannot be said to have acted erroneously or unjustifiably. (*Varma, J.*) PRASAD MAHTO *v.* MT. JASADA KUER. 169 I.C. 822=10 R.P. 52=3 B.R. 628=18 Pat.L.T. 491=1937 P.W.N. 309=A.I.R. 1937 Pat. 328.

——S. 45—*Evidence of handwriting expert—Duty of Court.*

There is no doubt that a comparison of handwriting is something hazardous and inconclusive, and should be made with care and caution in the light of assistance that may be available in the shape of expert evidence or arguments on behalf of parties concerned, or other ways ensuring a right decision. No hard and fast rule could possibly be laid down as to the best method of arriving at a proper conclusion on the question of similarity of handwriting. The rejection even *in toto* of an expert's opinion would not exonerate

the Court from the duty of coming to an independent finding on the question of an authorship of handwriting; the Court has to examine the opinion and come to its own decision. The most important things are to examine the general characteristics, formation of letters, fixed pen habits and mannerisms, and discern the identity of the writer. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characteristics and idiosyncracies which have been embodied in technical language of experts. (*Guha, Bartley and Nasim Ali, JJ.*) JITENDRA NATH GUPTA *v.* EMPEROR. 169 I.C. 977 =38 Cr.L.J. 818=10 R.C. 69=A.I.R. 1937 Cal. 99 (S.B.).

——S. 45—*Expert evidence—Value of.*

Where a handwriting expert was privately consulted by a party before he was produced in court and he was produced as his opinion was favourable to that party much importance cannot be attached to his evidence. (*Abdul Qayoom, C.J. and Kichlu, J.*) STATE *v.* SHAM LAL. 39 P.L.R. J. and K. 54.

——S. 45—*Expert evidence—Value of.*

The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general, it cannot be the basis of conviction unless it is corroborated by other evidence. (*Niamatullah, J.*) SAQLAIN AHMAD *v.* EMPEROR. 160 I.C. 264=37 Cr.L.J. 263=1936 A Cr.C. 40=8 R.A 582=1936 A.W.R 119=1936 A.L.J. 317=1936 A.L.R. 70=1936 Cr.C. 187= A.I.R. 1936 All. 165.

——S 45—*Expert not acquainted with characters—If can be competent handwriting expert.*

The fact that an expert if not acquainted with the characters of the language and can neither read nor write them, will not make him incompetent as an expert in handwriting. (*Niamatullah, J.*) SAQLAIN AHMAD *v.* EMPEROR. 160 I.C. 264 =37 Cr.L.J. 263=8 R.A. 582=1936 A.Cr.C. 40= 1936 A.W.R. 119=1936 A.L.J. 317=1936 Cr.C. 187=1936 All.L.R. 70=A.I.R. 1936 All. 165.

——S. 45—*Foot-print expert—Evidence of—Admissibility and value of—Circumstantial evidence.*

It is quite clear that the science, if it could be so called, of foot-prints has not yet progressed very far. But there is no doubt whatever that evidence of similarity of the impressions of the foot, shod or unshod, given by a foot-print expert is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimiliarity than one who has made no such study. He is able to lay these points before the Court, and from his evidence the Court draws its own conclusions. (*Burn and Lakshmana Row, JJ.*) MYLASWAMI GOUNDAN *v.* EMPEROR. I.L.R. (1938) Mad. 262= 172 I.C. 485=10 R.M. 466=39 Cr.L.J. 149= 1937 M. Cr.C. 272=1937 M.W.N. 874=46 L.W. 477=A.I.R. 1937 Mad 951

——S 45—*Finger-print expert—Evidence of—Value—Need for corroboration.*

It is going too far to say that the Court must insist upon corroboration of the evidence of a

finger-print expert. On the other hand, the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court cannot hold him guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks, which is a question of fact on which the Court can, and should, with the assistance of the expert, satisfy itself, and secondly on the point, which is one for expert opinion, whether it is possible to find the finger-prints or thumb impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics identical in the finger-prints of two persons as are found in the case, and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hesitate subject in accepting the opinion. (*Beaumont, C.J. and Macklin, JJ.*) EMPEROR *v.* FAKIR MAHOMMED RAMZAN 60 Bom. 187=162 I.C. 231=37 Cr.L.J. 539=8 R.B. 400=38 Bom.L. 160=1936 Cr.C. 335=A.I.R. 1936 Bom. 151.

——S. 45—*Medical evidence as to age—Value—If amounts to legal proof of age.*

Though a doctor is in a better position to form an opinion about the age of a person than a layman, his statement is no more than an opinion and could not amount to legal proof of the age of the person concerned. (*Ismail and Mulla, JJ.*) EMPEROR *v.* QUDRAT. I.L.R. (1939) All. 871=185 I.C. 271=12 R.A 310=41 Cr.L.J. 142=1939 A.W.R. (H.C.) 693=1939 A Cr.C. 161=1939 A.L.J 980=A.I.R. 1939 All. 708.

——S. 47—*Scope—If contemplates production of copy of document.*

When a question has to be decided as to the person to whom any document was signed or written, then according to S. 47 of the Evidence Act, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. But the section contemplates only the production of the original document and not a copy of it. (*Mehta, J.M.*) BHARAT SINGH *v.* PATHAK HAR SAHAI. 1939 R.D. 105=1939 A.W.R. (B.R.) 167.

——S. 47—*Scope—Statement by witness that certain document is in handwriting of known person—Admissibility and value of—Document not before Court—Effect—Witness—If must state source of knowledge at first.*

When a witness says that a particular document is in the handwriting of a certain person whom he knows, it is evidence of a fact. The fact that the witness does not also say that he knows and is acquainted with the handwriting of the person concerned does not render that evidence inadmissible. That is legal evidence of the handwriting of that person. The witness need not say in the first instance that he knows the handwriting. It is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he is not satisfied with the testimony of

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the witness as it stands. Nor would the fact that the document is not before the Court render such evidence inadmissible. (*James, J.*) JAGDISH DAS *v.* EMPEROR. **178 I.C. 324=11 R.P. 240=5 B.R. 82=1938 P.W.N. 403=40 Cr.L.J. 27=A.I.R. 1938 Pat. 497.**

——S. 47—*Witness deposing as to handwriting —Degree of acquaintance—Relevancy.*

Where a witness deposes that a certain document is in the handwriting of the accused, the degree of his acquaintance with that handwriting will affect the value, though not the admissibility of his evidence. (*Niamatullah, J.*) SAQLAIN AHMAD *v.* EMPERROR. **160 I.C. 264=37 Cr.L.J. 263=8 R.A. 582=1936 A. Cr.C. 40=1936 A.W. R. 119=1936 A.L.J. 317=1936 Cr.C. 187=1936 All.L..R. 70=A.I.R. 1936 All. 165.**

——S. 48—Applicability—Chota Nagpur tenancy—Sifton's Settlement Report—Admissibility to prove incident. *See* EVIDENCE ACT, SS. 32, 35, 48 AND 57 (13). **A.I.R. 1937 Pat. 463.**

——S. 49—Scope—Charge of gambling—Evidence of police officer that slips are slips and instruments of gaming—Relevancy—Conditions. *See* EVIDENCE ACT, SS. 45 AND 49. **39 Bom.L.R. 613.**

——S. 49—*Unregistered deed of gift—Admissibility to prove collateral purpose.*

Where a deed of gift contains an agreement transferring one ghumaon of land to the donee and also relinquishment of reversionary rights by a reversioner, the deed, although it is inadmissible in evidence, for want of registration so far as the gift is concerned, can be admitted in evidence under S. 49 for the collateral purpose of proving the relinquishment of reversionary rights. (*Bhide, J.*) NAND LAL *v.* MT. LAKHMI. **187 I.C. 865=12 R.L. 500=A.I.R. 1939 Lah. 414.**

——S. 50—*Adoption—Evidence of repute.*

Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what was the attitude of the alleged adoptive parents towards the claimant. A mere statement that an adoption was held by the witnesses or other persons does not come within the scope of S. 50, the only provision of Evidence Act, under which evidence of repute is admissible. (*Mosely and Mackney, JJ.*) MAUNG MYN MAUNG *v.* MA MYA SEIN. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

——S. 50—Reputation—Evidence as to—What is admissible—Section, if affected by S. 110, Cr.P. Code. *See* BUDDHIST LAW (BURMESE)—MARRIAGE. **A.I.R. 1940 Rang. 181.**

——S. 50—*Scope—Proof of marriage—Statement as to marriage—Admissibility.*

Mere statements that a person is or is not married are not admissible under S. 50, Evidence Act. What the Court wants under S. 50 is the opinion expressed by conduct of any person who as a member of the family or otherwise has special means of knowledge of the relationship. (*Davis, J.C. and Mehta, A.J.C.*) SECRETARY OF STATE *v.* MT. MARIAM. **31 S.L.R. 71=169 I.C. 685=10 R. S. 26=A.I.R. 1937 Sind 126.**

——S. 54—Scope—Evidence of accused being member of criminal tribe—Relevancy—When to be adduced—Procedure. *See* CR. P. CODE, S. 310. **1939 P.W.N. 627.**

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——S. 54—*Scope—Evidence pointing to directly similar conduct—Admissibility.*

In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime, before the jury, the intention of S. 54 is not infringed and evidence pointing to directly similar conduct is admissible. S. 54 refers to specific evidence of bad character not confined to acts similar to the crime which was being investigated, which may influence the jury on the question of motive which dealt with the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried. (*Cunliffe and Henderson, JJ.*) RAIKHON BORO *v.* EMPEROR. **166 I.C. 364=9 R.C. 504=38 Cr.L.J. 195=1936 Cr.C. 683=A.I.R. 1936 Cal. 469.**

——S. 54—*Statement as to opinion of another witness relating to bad character of accused—Admissibility for collateral purpose.*

A statement elicited from a prosecution witness in a sessions trial by way of cross-examination under S. 54, Evidence Act, to the opinion of another witness about the bad character of the accused, does not amount to evidence of bad character, when the statement was not elicited for the purpose of proving what sort of character the accused bore but with the collateral object of showing that the other witness was resiling from the evidence which he gave before the committing Magistrate, and the admission of that statement does not, therefore, contravene the provisions of S. 54 of the Evidence Act. (*Henderson and Khundkar, JJ.*) NITAI KOLEY *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 337.**

——S. 57—*Passages in books containing alleged tradition—If can be taken judicial notice of.*

Before any judicial notice could be taken of any passages in books relating to an alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had any special knowledge of the alleged tradition or the tradition is a repetition of that given in the history. (*Coldstream and Bhide, JJ.*) ACHAL SINGH *v.* GIRDHARI DAS. **171 I.C. 970=10 R.L. 262=39 P.L.R. 802=A.I.R. 1937 Lah. 529.**

——Ss. 57 (6) and 85—*Scope—Power of attorney given under seal of notary public—Presumption of due execution before, and authentication by notary public—Duty of Court to raise.*

The provisions of S. 85 of the Evidence Act are mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power of attorney have been duly fulfilled. But S. 85 is not exhaustive, for there are different legal modes of executing a power of attorney under S. 57 (6) of the Evidence Act, the Court shall take judicial notice of, *inter alia*, all seals of notaries public. Where a power of attorney is given under the seal of a notary public, the Court must presume its proper execution before, and authentication by the notary public. (*Wadia J.*) PERFORMING RIGHT SOCIETY, LTD. *v.* INDIAN MORNING POST RESTAURANT. **I.L.R. (1939) Bom. 295=184 I.C. 673=**

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12 R.B. 192=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.

——S. 57 (13)—Book or document of reference—Sifton's Settlement Report—Entries as to tenancies in Chota Nagpur—Admissibility. *See* EVIDENCE ACT, Ss. 32, 35, 48 AND 57 (13). A.I.R. 1937 Pat. 463.

——S. 58—*Effect of—Admission by defendant—Power of Court to decree suit on without proof.*

The effect of S. 58 of the Evidence Act is to dispense with the necessity of proof of any matter which is admitted by the defendant in a suit, and there is nothing to preclude the Court from decreeing a suit on such admissions. (*Niyogi, J.*) RAMLAL *v.* SETH SHEOLAL. 169 I. C. 323=10 R.N. 2=20 N.L.J. 21.

——S. 60—Exclusion of hearsay evidence—Relaxation of rule—Evidence of family tradition—Admissibility. *See* EVIDENCE ACT, S. 2. 41 C. W.N. 1103.

——S. 62, Expl. (2)—*Applicability—"Uniform process"—Simultaneous typing of letter and copies on machine without signature—Subsequent signature on one and initials on the rest—Copies—If primary evidence of letter.*

To bring a document under Expl. 2 to S. 62 of the Evidence Act, the whole document, together with the signature thereto, if any, must be made by the uniform process. Where a letter together with several copies are prepared by one process, namely typing on a type-writer, and one of them alone is afterwards signed separately, but the rest were only initialled, it cannot be said that the signature on the one and the initials on the rest have been made by one uniform process. The copies therefore cannot be held to be primary evidence of the letter. (*Venkataramana Rao, J.*) SIVASANKARAM PILLAI *v.* NARAYANA RAO. 177 I. C. 592=11 R.M. 357=1937 M.W.N. 746=46 L. W. 437=A.I.R. 1937 Mad. 807=(1937) 2 M.L. J. 381.

——S. 63—*Counterfoils of receipts—Admissibility.*

Counterfoils of original receipts are admissible in evidence only if proof of the loss of the originals has been given. (*Tek Chand and Dalip Singh, JJ.*) HAFIZ MAHOMED SULEMAN *v.* HARI RAM. 176 I.C. 65=11 R.L. 151=39 P.L.R. 602=A.I. R. 1937 Lah. 370.

——S. 63—*Scope—Abstract translation—Admissibility.*

Section 63, Evidence Act, is exhaustive of the meaning of 'secondary evidence'. An 'abstract translation' which does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of its terms, produced in a case where the point in purport of which the document is sought to be produced was of no importance, does not come within the terms of S. 63 and is inadmissible. (*Tek Chand and Dalip Singh, JJ.*) HAFIZ MAHOMED SULEMAN *v.* HARI RAM. 176 I.C. 65=11 R.L. 151=39 P.L. R. 602=A.I.R. 1937 Lah. 370.

——S. 63—Secondary evidence—Absence of evidence of comparison with original—Objection on scope of—When to be taken—Copies admitted in appeal without objection—Objection in second appeal—Competency. *See* C. P. CODE, O. 41, R. 27. 17 Pat.L.T. 709.

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——S. 63 (3)—*Secondary evidence—Copy of copy not proved to have been compared with original—Admissibility to prove original.*

A copy of a copy, in the absence of proof of comparison with the original is not good secondary evidence of the original, and is not such evidence of the original in the absence of consent. (*Wadsworth, J.*) NARASIMHAM *v.* BABU RAO. I.L.R. (1939) Mad. 333=183 I.C. 751=12 R.M. 369 (2)=48 L.W. 650=1938 M.W.N. 1102=A.I. R. 1939 Mad. 40=(1938) 2 M.L.J. 883.

——Ss. 65 and 91—*Contract agreeing to pay certain sum for collecting bidi leaves—Contract reduced to writing—Suit on—Document not produced—Oral evidence—Admissibility.*

There was a contract between *A* and *B*, *B* agreeing to collect bidi leaves for a term of three years on payment of Rs. 100 per year. The contract was reduced to writing. In suit by *A* on non-payment of the sum, *B* did not produce the document in his possession when called upon to do so.

Held, *A* was entitled to give oral evidence of the terms of the contract. (*Pollock, J.*) AHMEDKHAN JAMATHKHAN *v.* MOHAMMAD KHAN. 169 I.C. 834=9 R.N. 25=A.I.R. 1937 Nag. 116.

——Ss. 65 and 66—*Notice—Power of Court to dispense with.*

The only purpose of a notice under Ss. 65 and 66 of the Act is to give the party an opportunity by producing the original to secure, if he pleases the best evidence of the contents. Secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect, produce the original document in reasonable time and under S. 66 the Court has absolute power, when it thinks fit, to dispense with a notice under these sections. (*Sir George Rankin.*) SURENDRA KRISHNA ROY *v.* MIRZA MAHAMMAD SYED ALI. 63 I.A. 85=1936 M.W.N. 22=1936 A.L.J. 84=38 Bom L.R. 330=63 C.L.J. 29=19 N.L.J. 29=8 R. P.C. 133=160 I.C. 29=1936 A.W.R. 45=38 P. L.R. 19=40 C.W.N. 226=43 L.W. 107=1936 O. W.N. 10=1936 P.W.N. 159=1936 All.L.R. 91= 1936 O.L.R. 60=A.I.R. 1936 P.C. 15=70 M.L.J. 206 (P.C.).

——S. 65—*Original document inadmissible as being privileged—Secondary evidence—Admissibility.*

Where the original of a document cannot be admitted in evidence on the ground of privilege under S. 124 of the Evidence Act, no secondary evidence of its contents can be given. (*Venkataramana Rao, J.*) SIVASANKARAM PILLAI *v.* NARAYANA RAO. 177 I.C. 592=11 R.M. 357=46 L.W. 437=1937 M.W.N. 746=A.I.R. 1937 Mad. 807= (1937) 2 M.L.J. 381.

——S. 65—Qabuliat *burnt in fire—Evidence of writer of lease and* qabuliat—*If good secondary evidence.*

Where a *qabuliat* was burnt in a fire, no better secondary evidence could be produced than the writer of the lease and *qabuliat* and the other leases which the lessor issued on the same day. (*Bomford, J.M.*) DHIRJA *v.* SATNARAIN. 1937 R.D. 119.

——S. 65 (a)—*Income-tax return—Secondary evidence of—Admissibility.*

Under S. 65 (*a*) of the Evidence Act secondary evidence of the contents of an income-tax return

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would not be admissible. The Income-tax Officer is subject to every process of the Court. (*Burn, J.*) VARADARAJAM CHETTY *v.* KANAKAYYA. 186 I.C. 7=12 R.M. 582=1939 M.W.N. 377=1939 I.T.R. 331=A.I.R. 1939 Mad. 546=(1939) 1 M.L.J. 791.

——Ss. 65 (e) and 74—*Income-tax return—Statement of assessee showing details of income and profit and loss statement—If public documents—Certified copies—Admissibility in evidence—Income-tax Act, S. 54—Scope.*

A profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under S. 22 of the Income-tax Act, are public documents with reference to S. 74 of the Evidence Act of which certified copies would be admissible under S. 65 (*e*) of the Evidence Act. There is nothing in S. 54 of the Income-tax Act which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document. It would be putting an unwarranted restriction on the words "documents forming the act or records of the acts" in S. 74 (1) of the Evidence Act to say that that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents, which he has himself called for or which have been admitted to the record for the purposes of the assessment. (*Leach, C.J., King and Somayya, JJ.*) RAMA RAO *v.* VENKATRAMAYYA. 52 L.W. 159=1940 M.W.N. 787=1940 I.T.R. 450=A.I.R. 1940 Mad. 768=(1940) 2 M.L.J. 257 (F.B.).

——S. 65 (e)—*"Public document"—Income-tax returns—If public documents—Certified copies of returns—Admissibility to prove contents thereof—Income-tax Act, S. 54—Scope and object of.*

An income-tax return cannot be held to be a public document as defined by S. 74 of the Evidence Act, and cannot be proved by secondary evidence, *i.e.*, by the production of a certified copy under S. 65 (*e*) of the Evidence Act. S. 54 of the Income-tax Act makes it clear that a return made by an assessee cannot possibly be part of the act of the Income-tax officer. In that section such returns are made confidential and no Court can require any public servant to produce them before it. If the return is a public document, any person who happens to come into possession of a certified copy of it can produce that copy into Court, and so prove the contents of the return, thus defeating the express provisions of S. 54 of the Income-tax Act. It may be that certified copies of the returns made by an assessee can be granted to the persons who make the returns for their own private information since that would not come under the head of disclosure under S. 54 (2). But that does not mean that a third party who has, in some way, come into possession of the certified copies can use them to his own advantage. If that were so, the Court would be faced with the ludicrous position that the Income-tax officer, though forbidden to disclose the contents of the returns could, by furnishing certified copies, facilitate such disclosure. It is the policy of the Income-tax law, that statements made in these returns shall not be brought up in Court against the persons making them or for that matter against any one else. Certified copies of such returns are consequently not admissible in evidence to prove their contents under S. 65 of the Evidence Act. (*Burn and Stodart, JJ.*) MYTHILI AMMAL *v.* JANAKI AMMAL. I.L.R. (1940) Mad. 329=189 I.C. 722=50 L.W. 815=1939 I.T.R. 657=1939 M.W.N. 1237=A.I.R. 1940 Mad. 161.

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——S. 66—*Notice to produce not given—Admission of secondary evidence—Omission to object at the time of reception—Effect of.*

No doubt under S. 66 a notice to produce the document must previously have been given to the party in whose possession or power the document is before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, *e.g.*, where the Court in its discretion thinks it fit to dispense with it; the objection should however be raised at the time of the reception of the evidence and no objection should be allowed to be taken in appellate Court as to the admissibility of secondary evidence which was admitted in evidence in trial Court without any objection. (*Mya Bu, J.*) U PO KIN *v.* U SO GALE. 163 I.C. 408 (2)=9 R.R. 14=A.I.R. 1936 Rang. 277.

——S. 66, Proviso 2—*Applicability—Secondary evidence—Objection to admissibility by party having original—Notice to produce—If necessary.*

Where a party alleges that no facts are adduced by the opposite party nor any facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original document is in possession or control of the party taking the objection and he fails to produce it, Proviso 2, S. 66 applies and notice to the party to produce the original is not necessary as by the nature of the case the party must be held to be knowing that he would be required to produce it. (*Wort and Rowland, JJ.*) SUDHAKAR MISRA *v.* NILKANTHA DAS. 161 I.C. 465=8 R.P. 446=A.I.R. 1936 Pat. 129.

——S. 68—*Attestation—Proof of—Mortgage bond—Proof of due execution and execution by evidence of one attesting witness—Another attestor not formally speaking to attestation—Deed—If not duly attested.*

Where a mortgage bond attested by more than two witnesses is proved to be duly executed and attested by the evidence of one attesting witness, and is marked as an exhibit without objection, the mere fact that another attesting witness who also examined does not formally prove attestation will not lead to the inference that the latter has not in fact attested the bond. (*Harries, C.J. and Chatterji, J.*) JAI GOBIND SINGH *v.* PACHKAURI RAM. 5 B.R. 613=181 I.C. 572=11 R.P. 599=A.I.R. 1939 Pat. 555.

——S. 68—*Attesting witness—Sub-Registrar.*

A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness. (*Pollock, J.*) GANPATRAO *v.* NAGORAO. 1940 N.L.J. 437.

——Ss. 68 and 72—*Bond falling under S. 2 (5), Stamp Act—Proof of execution—Necessity.*

The definition of bond in S. 2 (5) of the Stamp Act, is not exhaustive, nor is it proper to infer from the definition in an Act which deals with stamp matters only that it means that such a document is acquired by law to be attested. Therefore it is S. 72 of the Evidence Act which

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applies to the case of a bond and not S. 68 and examination of the attesting witnesses to prove execution is not necessary. (*Gruer, J.*) RAMCHANDRA *v.* ZIBAL. 188 I.C. 638=13 R.N. 5=1940 N.L.J. 70=A.I.R. 1940 Nag. 240.

——S. 68—*Construction—Document tendered only to prove an admission—Requirements as to proof of attestation—Necessity.*

If S. 68 of the Evidence Act was intended to express that a document required by law to be attested should not be used as evidence *for any purpose* until one attesting witness at least had been called, when the words 'for any purpose' would have found a place in the section. Those words are not in the section and therefore it has to be concluded that this was not the intention of the framers of the Act. There is no reason why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. (*Bennet and Verma, J.*) SHYAM LAL *v.* LAKSHMI NARAIN. I.L.R.(1939) All. 366=181 I.C. 612=12 R.A 588 =1939 A.L J. 142=1939 A.W.R. (H.C.) 236= A.I.R. 1939 All. 269.

——Ss. 68 and 70—*Construction and scope—"Execution"—Meaning of—Deed requiring attestation—Executant stating that when he signed the deed there were no alterations or erasures and no attesting witnesses—If admission of execution—Duty to call attesting witness.*

The execution contemplated in S. 70 of the Evidence Act is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. In the case of document required to be attested, there can be no execution unless there has been a signing by the executant in the presence of the attesting witnesses, and execution is not complete unless the deed is attested by two witnesses. If a question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before S. 70 can be relied on, and the plaintiff is not relieved of the obligation of calling an attesting witness under S. 68 of the Evidence Act. A statement by the executant that when he signed the deed there were no alterations or erasures and there were no attesting witnesses to the document, etc., is not an admission of execution at all, but a denial of execution. (*Pandrang Rao and Venkataramana Rao, JJ.*) SHEIKH DAVOOD ROWTHER *v.* RAMANATHAN CHETTIAR. I.L.R. (1938) Mad. 523=176 I. C. 309=11 R.M. 57=1938 M.W.N. 1203=46 L. W 610=A.I.R. 1938 Mad. 43

——S. 68—*Document admitted in evidence without objection by defendant—Plaintiff, if absolved from proving due attestation.*

The mere fact that a document which is required by law to be attested was admitted in evidence without objection by the defendant, does not absolve the plaintiff from establishing that it had been duly executed and attested. (*Sen, J.*) BHIKARI CHARAN DAS *v.* SUDHIR CHANDRA JANA. 178 I.C. 992=11 R.C. 451=42 C.W.N. 1055=A.I.R. 1938 Cal. 702.

——S. 68—*Execution not denied—Attesting witnesses if should be called.*

Where execution of document is not denied, the execution and attestation of the document can be proved by other evidence, and it is unnecessary to call any of the attesting witnesses. (*Dunkley, J.*) M.P.A.K. FIRM *v.* MA MYA THEIN. 190 I.C. 413 =A.I.R. 1940 Rang. 184.

——S. 68—*Mortgage deed—Denial of execution—Failure to call attesting witness—Effect—Plea that mortgage was by delivery of possession—If open.*

Where a mortgage is created by an instrument, the instrument requires in law to be attested; and when its execution is specifically denied, one attesting witness, if alive, has to be called. If no attesting witness be called at all the document cannot be said to be proved. The mortgage having been created by deed, the person relying on the mortgagee cannot plead that it was really created by delivery of possession. (*Norman, I.C. S.*) DAULA NATH *v.* GANESH MAL. 1936 A.M.L. J. 54.

——Ss. 68 and 71—*Mortgage deed—Proof of execution—Mode of.*

Where the execution and attestation of the mortgage-deed are denied, but there is no plea that the deed for want of proper attestation does not operate as a mortgage-deed, the execution of deed is to be proved according to S. 68 by calling one attesting witness at least. The necessary conditions for a witness attesting the deed are firstly that he has seen the executant sign the instrument, and secondly he has signed the instrument in the presence of the executant. If these two conditions are fulfilled by a witness, there can be no doubt about his being an attesting witness. So where the witness in his evidence stated that all the executants signed the deed in his presence and the fact that he signed the deed in the presence of the executants was proved by the evidence of the scribe under S. 71.

Held, that the provisions of S. 68 were complied with. 1932 All. 527 (F.B.), Rel. on. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* COLLECTOR OF SAHARANPUR. 165 I.C 498=9 R.A. 287= 1936 A.L.J. 1262=1936 A.W.R. 887=1936 All.L. R. 923=A.I.R. 1936 All. 712.

——Ss. 68 and 70—*Registered deed of mortgage—Admission of execution—Examination of attesting witness—If necessary.*

Where in a suit on a registered deed of mortgage the execution of the deed is expressly admitted by the defendant and his counsel on the date of issues, it is not necessary for the plaintiff-mortgagee to call an attesting witness in proof of its execution. If there is no proof one way or the other about attestation and there is nothing on the face of the document to show that it had not been properly attested, the admission of execution would be sufficient proof of its execution against the party making the admission so as to dispense with proof of attestation. (*Srivastava and Nanavutty, JJ.*) RAJA RAM *v.* RAMESHWAR BAKHSH SINGH. 161 I.C. 605=8 R.O. 335=1936 O.W.N. 354=1936 O.L R. 194=A.I.R. 1936 Oudh 270.

——Ss 68 and 71—*Scope—English law—If stated in—Mortgage bond—Suit on—Proof of execu-*

tion—All living attesting witness—If to be called before offering evidence aliunde.

It is not the law that a plaintiff in a suit on a mortgage bond should call all the attesting witnesses to the bond who are alive before he can take advantage of S. 71 of the Evidence Act. It is incumbent on the plaintiff to call at least one witness, and if that witness denies or does not recollect the execution of the document, then the execution may be proved *aliunde*. Whatever the English-law may be Ss. 68 to 71 of the Evidence Act do not necessarily state it. (*Wort and Varma, JJ.*) MANKI KUAR *v.* HANSRAJ SINGH. 173 I.C. 983=4 B R. 370=19 Pat.L.T. 234=10 R.P. 467= A.I.R. 1938 Pat. 301.

——S. 68—*Sufficient compliance with—Calling of an attesting witness, who is disbelieved.*

Where though a person purports to be an attesting witness and is called at the trial for the purpose of proving the execution of a mortgage deed, but his evidence has not been accepted as evidence upon which any reliance could be placed, in such case, the contention that the provisions of S. 68 of the Evidence Act had been complied with and that no further evidence of due execution and attestation of the mortgage was necessary, cannot be accepted. (*Sir Lancelot Sanderson.*) SURENDRA BAHADUR SINGH *v.* BEHARI SINGH. I.L. R. (1939) Kar. 222=43 C.W.N. 669=1939 A.W. R. (P.C) 69=1939 O.A. 427=1939 O.W N. 450 =181 I.C. 216=5 B.R. 592=11 R.P.C. 226=50 L.W. 58=1939 A.L.J. 492=20 Pat.L.T. 565=41 P.L.R. 598=1939 M.W.N. 867=41 Bom.L.R. 1047=1939 O.L R. 298=A.I.R. 1939 P.C. 117= (1939) 2 M.L.J. 762 (P.C.).

——S. 68—*Suit based on mortgage-deed—Defendant admitting execution but denying attestation—Duty of plaintiff to prove due attestation.*

If in a suit for sale on the basis of a mortgage-deed the defendant admits having signed the deed but denies having signed it in the presence of the attesting witnesses, it is the duty of the plaintiff to prove the due attestation of the document. S. 68 does not dispense with the necessity of proving attestation, where the execution is admitted, but the attestation is specifically denied. (*Sulaiman, C.J. and Smith, J.*) BINDESHARI PRASAD *v.* PANCHAYATI AKHARA. 160 I. C. 73=8 R.A. 565=1936 A.W.R. 57=1936 All. L.R. 49=1936 A.L.J. 297=A.I.R. 1936 All. 169.

——S. 68, Proviso—*Certified copy of registered deed of gift produced in evidence—Party challenging it not denying specifically that it is copy of deed—Production of attesting witnesses, if essential.*

Where on the production of a certified copy of a registered deed of gift, the party challenging it does not specifically deny that it is the copy of the deed, according to the proviso to S. 68 the production of attesting witnesses to prove execution and attestation of the deed is not essential. (*Bhide, J.*) NAND LAL *v.* MT. LAKHMI. 187 I. C. 865=12 R.L. 500=A.I.R. 1939 Lah. 414.

——S. 68, Proviso—*Construction — Words 'Indian Registration Act,* 1908' *if refers to the particular Act alone.*

The words 'Indian Registration Act, 1908', occurring in proviso to S. 68 of the Evidence Act could not be interpreted so as to confine the application of the proviso, only to documents registered according to the provisions of that particular Registration Act and not of any previous Registration Act. (*Wort, J.*) JADUNATH MITRA *v.* ISAR JHA. 178 I.C. 198=5 B.R. 65=11 R.P. 229=A.I.R. 1939 Pat. 47.

——S. 68, Proviso—*'Execution'—Meaning of —Mortgage bond.*

The word 'execution' as used in the proviso to S. 68 of the Evidence Act in the case of a mortgage-bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of facts or formalities which are necessary to give the document validity as a mortgage. This includes attestation, and if attestation is expressly denied the plaintiff is not exonerated from the duty of complying with the provision of S. 68 by calling an attesting witness. (*Mukherjea and Latifor Rahman, JJ.*) HAREKRISHNA PANIGRAHI *v.* JOGNESWAR PONDA. 69 C.L.J. 454=43 C.W.N. 1025=187 I.C. 644=12R.C. 600=A.I.R. 1939 Cal. 688.

——S. 68, Proviso—*'Execution'—Meaning of—Mortgage bond—Suit on—Defendant admitting signature but denying attestation—Proof required of plaintiff.*

The word 'execution' as used in the proviso to S. 68 of the Evidence Act in the case of mortgage bonds which the law requires to be attested by witnesses means and includes all the series of acts which would give validity to the instrument *qua* mortgage, *i e.*, the word 'execution' used in that section not only means signing by the borrower but the attestation of his signature by the witnesses as required by S. 59 of the T. P. Act. If, therefore, in a suit on a mortgage bond the defendant admits the signature but denies the attestation, it must be taken that he denies the execution of the mortgage bond and this denial requires the plaintiff to prove the mortgage bond by examining one of the attesting witnesses, if available. (*R. C. Mitter, J.*) HARI NATH GHOSE *v.* NEPAL CHANDRA KAI CHOWDHURY. I.L.R. (1937) 1 Cal. 507=41 C.W.N. 306.

——S. 68, Proviso—*Registered mortgage deed —Proof—Execution not denied by mortgagor—Attesting witnesses—If need be called.*

Where the execution of a registered mortgage deed is not denied by the mortgagor, it is not necessary to call the attesting witnesses of the deed to prove it. (*Srivastava, Ag. C.J. and Zia-ul-Hasan, J.*) SHEO RATAN SINGH *v.* JAGANNATH. 12 Luck. 681=1936 O.L.R. 647=165 I.C. 404= 9 R.O. 212=1936 R.D. 533=1936 O.W.N. 1113 =A.I.R. 1937 Oudh 149.

——S. 68, Proviso—*"Specifically denied"—Meaning of—Plea that mortgage "not admitted" —If one of "denial"—Proof of attestation.*

Where a mortgagor merely does not admit the execution or attestation of the mortgage document and puts the mortgagee to proof, such as by saying that the validity of the mortgage, if any "is not admitted," the plea is not one of specific denial of the execution or attestation of the document. In such a case proof of one attestation is quite sufficient. It is only in a case where there is not only a want of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove, attestation of two witnesses. (*Sulaiman, C.J. and*

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Bennet, J.) AMIR HUSAIN *v.* ABDUL SAMAD. I.L.R. (1937) All. 723=171 I.C. 743=1937 A.L.R. 883=1937 A.L.J. 710=10 R.A. 309=1937 A.W.R. 641=A.I.R. 1937 All. 646.

——S. 68, Proviso—*Specifically denied—What may amount to.*

Where a defendant in a suit on a mortgage pleads that the contesting defendant does not admit the execution and completion of the document sued on, nor is receipt of any consideration of the same admitted, and further it is recorded by the trial judge that the pleader for the defendant in question 'hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client,' in such a case the contention that the execution of the mortgage had not been 'specifically denied' could not be accepted, and it must be held that in fact the execution has been specifically denied. (*Sir Lancelot Sanderson.*) SURENDRA BAHADUR SINGH *v.* BEHARI SINGH. I.L.R. (1939) Kar. 222=43 C.W.N. 669=1939 A.W.R. (P.C.) 69=1939 O.A. 427=1939 O.W.N. 450=181 I.C. 216=5 B.R. 592=11 R.P.C. 226=50 L.W. 58=1939 A.L.J. 492=20 Pat. L.T. 565=41 P.L.R. 598=1939 M.W.N. 867=41 Bom.L.R. 1047=1939 O.L.R. 298 =A.I.R. 1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.).

——S. 70—"*Admission*"—*Meaning of—Admission of execution made in power-of-attorney—Sufficiency of.*

The "admission" contemplated under S. 70 of the Evidence Act is an admission made for the purposes of or having reference to the suit, made either in the pleadings or during the course of the trial. The admission of execution contained in some other document such as a power-of-attorney cannot be availed for the purpose of dispensing with the citation of the attesting witness. (*Pandrang Rao and Venkataramana Rao, JJ.*) SHEIK DAVOOD ROWTHER *v.* RAMANATHAN CHETTIAR. I.L.R. (1938) Mad. 523=176 I.C. 309 =11 R.M. 57=1938 M.W.N. 1203=46 L.W. 610 =A.I.R. 1938 Mad. 43.

——S. 70—*Construction—"Admission of a party to an attested document of its execution"—Meaning of.*

The execution contemplated by S. 70 of the Evidence Act is not a mere signing of the document, but a due execution in accordance with what the law requires for the particular document. "Attested" means duly attested, and if a question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before S. 70 can be relied on. The admission contemplated by the section is an admission made for the purpose of, or having reference to the suit, and made either in the pleadings or during the course of the trial, and not an admission antecedent to the suit made in some other transaction of the party. (*Pandrang Row and Venkataramana Rao, JJ.*) SHEIK DAWOOD ROWTHER *v.* RAMANATHAN CHETTIAR. I.L.R. (1938) Mad. 523=176 I.C. 309=11 R.M. 57=46 L.W. 610=1938 M.W.N. 1203=A.I.R. 1938 Mad 43.

——S. 70—"Execution"— Meaning of—Deed requiring execution—Execution—When admitted. *See* EVIDENCE ACT, SS. 68 AND 70. 46 L.W. 610.

EVIDENCE ACT (1872), S. 71.

——S. 71—*Applicability—Evidence of attesting witness considered unreliable.*

S. 71 of the Evidence Act is applicable only where the attesting witness 'denies or does not recollect the execution of the document.' Their Lordships were doubtful whether the description would be applicable to the case of a witness whose evidence was considered unreliable but were willing to assume that the discrepancies were due to deficient recollection. It was held on the facts that even assuming that it would be legitimate in the above circumstances to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving its due execution and attestation, the plaintiffs had failed to prove the material facts necessary to comply with the provisions of the T. P. Act. (*Sir Lancelot Sanderson,*) SURENDRA BAHADUR SINGH *v.* BEHARI SINGH. I.L.R. (1939) Kar. 222 =43 C.W.N. 669=1939 A.W.R. (P.C.) 69=1939 O.A. 427=1939 O.W.N. 450=181 I.C. 216=5 B. R. 592=11 R.P.C. 226=50 L.W. 58=1939 A.L.J. 492=20 Pat.L.T.565=41 P.L.R.598=1939 M.W. N. 867=41 Bom.L.R. 1047=1939 O.L.R 298= A.I.R.1939 P.C. 117=(1939) 2 M.L.J. 762 (P.C.).

——S. 71—*Applicability—One of attesting witnesses summoned but not produced in Court—Duty of plaintiff.*

S. 71 of the Evidence Act has no application to a case where the attesting witnesses are not before the Court. If, therefore, the plaintiff takes out summons on one of the attesting witnesses and the witness does not appear in Court, that is not enough to let in further evidence under that section. In such a case it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally, or physically the plaintiff can avail himself of the provisions of S. 69 of the Act. (*Mukherjea and Latifur Rahman, JJ.*) HAREKRISHNA PANIGRAHI *v.* JOGNESHWAR PONDA. 69 C.L.J. 454=43 C.W. N. 1025=187 I.C. 644=12 R.C. 600=A.I.R. 1939 Cal. 688.

——S 71—*Construction—Evidence of executant of deed or other witnesses — Admissibility to prove execution—Denial or want of recollection by attesting witness—If condition precedent.*

S. 71 of the Evidence Act cannot be construed as meaning that the evidence of the executant of a deed required by law to be attested is not admissible unless the attesting witnesses denied or did not recollect the execution of the document. There is nothing in the Evidence Act which precludes a party from adducing as a witness to the execution of the deed any person who happened to be present when the deed was executed and actually saw it signed by the executant and by attesting witnesses. The section, while permitting the evidence of the executant of the deed in certain circumstances does not have the effect of rendering his evidence or that of other witnesses inadmissible in different circumstances. (*Thom and Allsop, JJ.*) MURARI LAL *v.* SAMI-UD DIN AHMAD KHAN. 1937 A.W.R. 115=168 I.C. 988 =9 R A. 691=1937 A.L.R. 437=1937 A.L.J. 161 =A I R. 1937 All. 273.

——S.71—*Proof of attestation by other evidence —Permissibility — 'Other evidence'—If includes plaintiff's evidence.*

EVIDENCE ACT (1872), S. 73.

The word 'execution' in S. 71 of the Evidence Act not only means signing by the executant but it means and includes attestation as well. If, therefore, an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence as laid down in the section. This other evidence includes his own evidence as well, although he is the grantee of the instrument. (*Mukherjea and Roxburgh, JJ.*) JAIKARANDAS *v.* PROTAPSINGH. I.L.R. (1939) 2 Cal. 479=187 I.C. 718=12 R.C. 604=43 C.W.N. 1084=A.I.R. 1940 Cal. 189.

——S. 73—*Comparison of signatures—Expert evidence—If necessary—Power of Court to form opinion on its own comparison of signatures.*

Although in a case where there is a serious conflict of evidence as to the genuineness of a signature, it would be unsatisfactory and dangerous to stake a decision on the correct determination of the genuineness of a signature by mere comparison with admitted signatures without any expert advice or evidence of microscopic enlargements, in a case where there is no conflict of evidence, the Court is entitled to form its own opinion after comparing the signatures on the documents produced in Court and the admitted signatures. Such procedure in expressly contemplated by S. 73 of the Evidence Act. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) NARAYANASWAMY *v.* EMPEROR. 17 Pat. 15=1938 P.W.N. 338=19 Pat.L.T. 432.

——S. 73—*Comparison of signature—Power of Court—Value to be attached.*

Although the law allows a Judge to compare a disputed signature with an admitted signature, he ought not to attach much weight to such comparison. (*Norman, I.C.S.*) CHOUDHMAL *v.* UDA. 1939 A.M.L.J. 34.

——S. 73—*Denial of signature—Safe way to prove signature.*

Where a signature is denied, the only safe way to prove that the alleged signature is really the signature of the person who denies it, is to produce some signature admittedly made by the same person at about the same time as the disputed signature was allegedly signed. (*Davies.*) RAM PAL *v.* TEBAR KHAN. 1940 A.M.L.J. 2.

——S. 74—*Applicability—Order sheet of Court in case.*

An order sheet in a case is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine. It would require evidence and not mere suggestion that it has been fabricated to justify its rejection. (*Rowland, J.*) NAND KUMAR *v.* EMPEROR. 172 I.C. 237=10 R.P. 316=39 Cr.L.J. 103=1937 P.W.N. 119=A.I.R. 1937 Pat. 534.

——S. 74—*Applicability—Takta or register of information regarding pargana watandars—If public document—Admissibility to prove date of grant contained therein—Certified copy — Sufficiency of.*

A register (takta) of information regarding the pargana watandars, prepared by an Assistant Collector under the directions given by the Collector under the orders of the Inam Committee comes within the definition of public document in S. 74 of the Evidence Act, being a record of the acts of a public officer and can be proved by a certified copy. It is also relevant evidence under S. 35, or at any rate under S. 13 of the Evidence Act to prove the date of a grant contained in it. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v.* TUKKO. I.L.R. (1937) Bom. 464=170 I.C. 801=10 R.B. 121=39 Bom.L.R. 288=A.I.R. 1937 Bom. 307.

EVIDENCE ACT (1872), S. 74.

——Ss. 74 and 77—*Certified copy of entry of registration of deed—Admissibility.*

A certified copy of the entry of registration of a deed is admissible in evidence under Ss. 74 and 77 as proof of the entry, but not of the contents of the deed. (*Lort Williams, J.*) HEMANTA KUMAR DAS *v.* ALIANTS INSURANCE COMPANY. 177 I.C. 517=11 R.C. 253=A.I.R. 1938 Cal. 120.

——S. 74—Income-tax return—If public document. *See* EVIDENCE ACT, S. 65 (*e*). 50 L.W. 815.

——S. 74—'Public document'—Book maintained in Collector's office of copies of communication sent to subordinate offices—If public document—Proof by certified copy — Permissibility. *See* EVIDENCE ACT, S. 35. 1939 M.W.N. 841.

——Ss. 74 and 76—*"Public document"—Entry in Register of Powers-of-attorney—Copy of such entry—Admissibility—Registration Act, S. 69.*

The Register of Powers-of-attorney is maintained by the Registering officer under certain rules made by the Inspector-General of Registration under S. 69 of the Registration Act. Every entry in that Register is therefore "a public document" within the meaning of S. 74 (1) (*iii*) of the Evidence Act, being a document forming "the act or record of the act" of an executive public officer in the discharge of a statutory duty imposed upon him. It follows that a true copy of the entry (which by virtue of S. 76 of the Evidence Act) is a certified copy within the meaning of S. 63 (1), is admissible as proof of the original entry by virtue of S. 65 (*e*) of the Evidence Act. (*Mitter and Rau, JJ.*) PATTU KUMAR *v* NIRMAL KUMAR. 185 I.C. 691=12 R.C. 392=43 C.W.N. 907=70 C.L.J. 5=A.I.R. 1939 Cal. 569.

——S. 74—*"Public document"—Finger print slip—Extract from jail register—List of previous convictions—Admissibility to prove earlier convictions—Identity of accused with previously convicted person—Proof.*

A finger print slip taken in pursuance of a statutory duty cast upon police officers after a convict enters the jail is an act of the executive under S. 74 of the Evidence Act and is therefore a public document. So also the jail register which is written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail is a public document. But before the finger print slips or the extracts from the jail register can be admitted in evidence as proof of previous conviction of the accused, the identity of the person whose name appears in the slip or jail register must be satisfactorily established to be that of the accused who is being tried. Where it is proved that the accused on trial before the Court had his finger prints taken in jail far away from his native place, soon after a person of his name was convicted of an offence, that is certainly very strong evidence indeed that the person bearing his name who was convicted of an offence was the very person who shortly afterwards had his thumb-impressions taken. But where the finger prints were taken elsewhere or taken in a place not the place of conviction, and taken sometime after the conviction, it can-

not be said that the identity of the convicted person with the accused before the Court has been established. A calendar extract showing previous convictions would be confirmatory of the other evidence establishing the identity of the convicted person in the earlier cases with the accused before the Court. But the list of previous convictions contained in the finger print slips cannot be said to be satisfactory evidence of the previous convictions recited therein. (*Horwill, J.*) ARUMUGAM *v.* EMPEROR. **180 I.C. 431=11 R.M. 700=40 Cr.L.J. 355=1938 M.Cr.C. 145=1938 M.W.N. 595=48 L.W. 639=A.I.R. 1938 Mad. 858.**

——S. 74 (1)—Public document—Income-tax return and statement filed by assessee showing details of income *See* EVIDENCE ACT, Ss. 65 (*e*) AND 74. **(1940) 2 M.L.J. 257 (F.B.).**

——S. 76—*Copy of talukdhari Sanad not sealed—Other formalities carried out—Copy, if uncertified.*

Undoubtedly under S. 76 of the Evidence Act a copy of a talukdari sanad to be certified should be sealed whenever the keeper of the records of the Government of India is authorised by law to make use of a seal. But if there is no evidence to the effect that he is so authorised, the Court cannot make such a presumption when other necessary formalities have been duly carried out. Accordingly a copy of a sanad which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. **13 Luck. 723=172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67=10 R.O. 200=A.I.R. 1938 Oudh 69.**

——Ss. 76 and 77—*Income-tax assessment order—Assessee's right to a copy—Admissibility of such copy—Income-tax Act, S.* 54.

Although an income-tax assessment order is a public document within the meaning of S. 74 of the Evidence Act, the assessee has no right to inspect it, and has, therefore, no right to demand a certified copy of it under S. 76 of that Act. Accordingly a copy of that order obtained from the Income-tax Department is not under S. 77 of that Act a certified copy which may be produced in proof of the contents of the original order of assessment. (*Panckridge, J.*) PROMOTHA NATH *v.* NIRODE CHANDRA. **I.L.R. (1939) 2 Cal. 394=188 I.C. 37=12 R.C. 643=1939 I.T.R. 570=43 C.W.N. 1169=A.I.R. 1940 Cal. 187.**

——S. 78—Scope—If exhaustive—Order by Government affixed with Government seal—Proof of—Necessity. *See* GOVERNMENT OF INDIA ACT (1919), S. 49. **A.I.R. 1936 Cal. 316.**

——S. 78—Wajib-ul-arz—*Mode of proof.*

The *wajib-ul-arz* is a part of the record-of-rights. It is unnecessary to produce any witness to prove the *waiib-ul-arz*. It is a public document and is admissible in evidence without any formal proof. (*Abdul Rashid, J.*) FAJJU *v.* SIRYA. **170 I.C. 392=39 P.L.R. 491=38 Cr.L.J. 881=10 R.L. 107**

——S. 78 (1)—*Applicability—Report published by Government—If public document provable under.*

With respect to the existence of certain tauzi numbers reliance was placed on a report published by Government and this report was filed by the party relying on it, but was returned by the Court thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57 of Evidence Act. There was a reference to this report in the judgment of the Court.

Held, that the Court should have regarded the report as a public document under S. 78 of the Act and admitted it formally in evidence and marked it as an exhibit, inasmuch as the report could be proved by "any document purporting to be printed by order of Government" under S. 78 of the Act. (*Rowland, J.*) SAHDON SINGH *v.* BALAM SINGH. **170 I.C. 61=10 R.P. 64=3 B.R. 648=A.I.R. 1937 Pat. 334.**

——S. 78 (1)—*Notification not published in Government Gazette as required by S. 4 (36) and S. 26 of N.W.F. General Clauses Act—If can be proved.*

Where the notification is not publised in the N.W.F. Government Gazette as required by Ss. 4 (36) and 26, N.W.F. General Clauses Act, such notification is not one that has been 'made' and is in fact not a 'notification'. It cannot be proved under S. 78 (1) of the Act by producing Revenue Records of the Province because a notification which does not exist cannot be proved. (*Middleton, J.C. and Almond, A.J.C.*) EMPEROR *v.* FAZAL RAHMAN. **170 I.C. 772=10 R. Pesh. 23=38 Cr. L.J. 1042=A.I.R. 1937 Pesh. 52.**

——S. 79—Scope—Public document—Certificate of visitors of lunatic asylum—If public document—Formal proof—Necessity—Presumption of genuineness. *See* CR. P. CODE, S. 473. **63 Cal. 425.**

——S. 80—*Applicability—Confession in Indian Native States—Admissibility.*

Confessions recorded in Indian Native States can be used in British India under the provisions of S. 80, Evidence Act, and they may be accepted as admissible for prosecution in British India. (*Bennet and Verma, JJ.*) LAL SINGH *v.* EMPEROR. **I.L.R. (1938) All. 875=178 I.C. 694=11 R.A. 327=40 Cr.L.J. 132=1938 A.Cr.C. 107=1938 A.L.R. 881=1938 A.W.R. (H.C.) 642=1938 A.L.J. 943=A.I.R. 1938 All. 625.**

——S. 83—Applicability—Municipal Survey map prepared under Calcutta Survey Act—Presumption of correctness. *See* CALCUTTA SURVEY ACT. **18 Pat.L.T. 464.**

——S. 83—Maps prepared by Municipality under Calcutta Survey Act—Presumption of correctness *See* CALCUTTA SURVEY ACT. **A.I.R. 1937 Pat. 567.**

——S. 83—*Plan relied on before Commissioner but accuracy not proved—Admissibility.*

A plan, the accuracy of which has not been established by evidence in accordance with S. 83 of the Evidence Act, can be admitted in evidence when both parties had relied on it before the local Commissioner and no objection was taken that it had not been proved to be accurate. (*Abdul Rashid, J.*) MAHOMED SULEMAN *v.* BUDRUDDIN. **42 P.L.R. 247=A.I.R. 1940 Lah. 309.**

——S. 85—*Power-of-attorney—Proper execution—Presumption.*

S. 85 says that a power-of-attorney shall be presumed to have been properly executed if it had been verified by a Magistrate or certain other officers. It may be that there is not this presump-

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tion in favour of a particular power-of-attorney, but it does not follow that there is an opposite presumption that it has not been duly executed. (*Allsop and Ganga Nath, JJ.*) RAM KAILASH KUNWARI *v.* LALA ISHWARI SARAN. 163 I.C. 754 =9 R.A. 70=1936 A.L.J. 684=1936 All.L. R. 639=1936 A.W.R. 497=A.I.R. 1936 All. 475.

———S. 85—Scope—If exhaustive. *See* EVIDENCE ACT, Ss. 57 (6) AND 85. 41 Bom.L.R. 530.

———S. 89—*Presumption under—When can be drawn.*

In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in the mortgagee's bahi and called upon the defendant to produce it. The defendant denied that he possessed any such bahi. The plaintiff's evidence showed that the entry was made in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it.

Held, that no presumption under S. 89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper, no question of presumption arose in such case. (*Bhide, J.*) LADHA RAM *v.* HARI CHAND. 181 I.C. 642=11 R.L. 869=A.I.R. 1938 Lah. 90.

———S. 90—*Ancient document—No proof as to who signed it—Admissibility.*

Where a party tendering a document is unable to say who prepared or signed it, or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof. 3 Pat.L.J. 306, Rel. on. (*Zia-ul-Hasan and Smith, JJ.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* LAL BAHADUR SINGH. 1937 R.D. 88=1937 O. L.R. 72 (2)=166 I.C. 930=9 R.O. 346=1937 O. W.N. 179=A.I.R. 1937 Oudh 353.

———S. 90—*Applicability—Anonymous document—Presumption—Necessity for proof as to writer—Objection to admissibility—When to be raised.*

S. 90 of the Evidence Act does not provide for any presumption regarding anonymous documents the writer of whom is not known. But an objection that the document should not be admitted without proof as to the writer of the document must be raised at the earliest stage, and cannot be permitted to be raised for the first time in second appeal. (*Wadsworth, J.*) CHANDUKUTTY NAMBIAR *v.* RAMA VARMA RAJA. 50 L. W. 527=1939 M.W.N. 946=A.I.R. 1939 Mad. 926=(1939) 2 M.L.J. 593.

———S. 90—*Applicability—Copies.*

No presumption under S. 90 of the Evidence Act can be raised on the basis of the certified copies when the originals are not forthcoming. (*Bhide, J.*) JIWAN *v.* KESHO DASS. 187 I.C. 848 =12 R.L. 498=41 P.L.R. 377 (2)=A.I.R. 1939 Lah. 273.

———S. 90—*Applicability—Copies of document.*

S. 90 of the Evidence Act can be of no help if the original deed is not forthcoming and only a certified copy has been produced. (*Bhide, J.*) KAHNA *v.* GOVERNMENT OF PUNJAB. 41 P.L.R. 376=A.I.R. 1939 Lah. 458.

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———S. 90—*Applicability—Copy not 30 years old.*

The presumption contained in S. 90 of the Evidence Act cannot apply to a copy that is not itself 30 years old. (*Pollock, J.*) GANAPATRAO *v.* NAGORAO. 1940 N.L.J. 437.

———S. 90—*Applicability—Copy of document more than 30 years old—Admissibility—Proof required.*

S. 90 of the Evidence of Act does not apply to a certified copy of a document, and a certified copy cannot be admitted in evidence without the requisite proof. But where a copy of a document is duly proved, and the original is proved to be lost, the copy can be admitted in evidence. (*Bose, J.*) MAHADEO GANORKAR *v.* SECRETARY OF STATE. 20 N.L.J. 209.

———S. 90—*Applicability—Copy of document 30 years old—Presumption of due execution of original—If arises.*

S. 90 of the Evidence Act does not apply to a copy. It is only where the original document which is 30 years old is produced before the Court that a presumption may be made under S. 90 as regards its genuineness. There is nothing in the section to justify the view that if a certified copy of an ancient document is produced before the Court the genuineness of the original may be presumed. The production of a copy is not sufficient to justify the presumption of due execution of the original under S. 90. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. 17 Mys.L.J. 510.

———S. 90—*Applicability to copy of document.*

A copy purporting to be more than 30 years old and produced from proper custody may be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, when that copy contains a statement that it is a true copy and contains the signature of the author of the original. In such a case the Court is entitled to presume the genuineness of the signature on the copy under S. 90 of the Evidence Act. (*Varadachariar and Abdur Rahman, JJ.*) SEVUGAN CHETTIAR *v.* ZAMINDAR OF SIVAGANGA. 1939 M.W.N. 841=A.I.R. 1940 Mad. 273.

———S. 90—Bahis of family priests—Admissibility. *See* EVIDENCE ACT, Ss. 32 (5) AND (6) AND 90. 39 P.L.R. 370.

———Ss. 90 and 114—*Certified copy of registered will produced—Power of Court to presume valid execution of will from proved facts.*

Apart from S. 90 of the Evidence Act, the Court can make a presumption of fact about the valid execution of a will from a certified copy of the will obtained from the Registration Office, if such presumption is justified by the proved facts and circumstances of the case. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 13 Luck. 723=39 P.L.R. 370=172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67=10 R.O. 200=A.I.R. 1938 Oudh 69.

———S. 90—*Copy — Certified copy—Production of—Genuineness of original—Presumption.*

Where certified copies of documents are produced and admitted as secondary evidence under

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S. 65 of the Evidence Act, the Court cannot presume the genuineness of the original documents under S. 90 of that Act. (*King, C.J. and Zia-ul-Hasan, J.*) KEOLAPATI *v.* HARNAM SINGH. **12 Luck. 568=162 I.C. 527=8 R.O. 387=1936 O.W.N. 619=1936 O.L.R. 271=A.I.R.1936 Oudh 298.**

——**S. 90**—*Copy—Certified copy—Production of—Presumption as to genuineness of document.*

In the absence of evidence to prove execution of a document no presumption as to genuineness of a document can be made so far as the certified copy of such document was concerned. Nor can execution be proved by the registration endorsement. (*Thom and Iqbal Ahmad, JJ.*) GOPAL DAS *v.* SRI THAKURJI. **A.I.R. 1936 All. 422.**

——**S. 90**—*Copy—Certified copy not 30 years old—Presumption, if can be drawn.*

Where the certified copy of the document is not 30 years old, presumption under S. 90 cannot be raised in respect of it. A.I.R. 1929 P.C. 115, Rel. on. (*Agha Haidar, J.*) MT. MULKH BANO *v.* MAHOMED BANARAS KHAN. **166 I.C. 647=9 R.L. 409=A.I.R. 1936 Lah. 788.**

——**S. 90**—*Copy—Production of—Genuineness of original—Presumption.*

No presumption can be raised under S. 90 of the Evidence Act as to the genuineness, or due execution of the original of a document which has been lost, and of which a copy is produced as secondary evidence. 1935 A.W.R. 879 (P.C.), Rel. on. (*Thom and Smith, JJ.*) MUMTAZ HUSAIN *v.* BRAHMANAND. **162 I.C. 56=8 R.A. 821=1936 A.W.R. 65=1936 A.L.J. 161=1936 All.L.R. 366=A.I.R. 1936 All. 298.**

——**S. 90**—*Deed signed on behalf of executant—Authority to sign—Presumption.*

Where a deed does not bear the signature of the alleged executant but purports to have been signed and executed by another on his behalf, there is nothing in the terms of S. 90 of the Evidence Act to justify a presumption that he had been authorised by the executant to sign or execute the deed on his behalf. Where there is no proof of such authority, no presumption can be raised about the genuineness of the deed. (*Srivastava, J.*) MAHOMED AZIM *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR. **12 Luck. 98=161 I.C. 269=8 R.O. 315=1936 O.W.N. 298=1936 O.L.R. 155=A.I.R. 1936 Oudh 170.**

——**S. 90**—*Document bearing no signature—Presumption of genuineness—If can be raised.*

If a document does not bear the signature of any one, no presumption can be made under S. 90 of the Evidence Act as to who wrote it, and on whose behalf. (*Nanavutty and Smith, JJ.*) SRI PRASAD *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR. **12 Luck. 400=164 I.C. 494=9 R.O. 75=1936 R.D. 408=1936 O.W.N. 768=1936 O.L.R. 467=A.I.R. 1937 Oudh 194.**

——**S. 90**—*Document found from settlement file—Presumption of genuineness.*

The Court cannot presume the genuineness of a document more than 30 years' old merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous, unless it is shown that it had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court. Where, therefore, a document found in the settlement file purports to be an order of a Raja to his servants prohibiting them from taking forced labour from the blacksmiths and carpenters of a certain village, the Court cannot assume that the impression of the seal on this document is the impression of the genuine seal of the Raja. 5 Cal. 918, Rel on. (*Nanavutty and Smith, JJ.*) SRI PRASAD *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR. **12 Luck. 400=164 I.C. 494=9 R.O. 75=1936 R.D. 408=1936 O.W.N. 768=1936 O.L.R. 467=A.I.R. 1937 Oudh 194.**

——**Ss. 90 and 114**—*Document in official records—Nature of presumption raised.*

The circumstances that a document purporting to have been signed by a certain person is among official records is no proof that the document is 30 years old and no presumption under S. 90 of the Evidence Act, comes into play. (*Weston.*) UMRAO MAL *v.* GOPI NATH. **1938 A.M.L.J. 63.**

——**S. 90**—*Documents produced as instances of custom—Admissibility without regard to their custody.*

In cases where documents more than 30 years old are being produced only as instances of a particular custom and not as foundation of title, such documents may be admitted in evidence irrespective of the fact whether they come from proper custody or not. (*Skemp, J.*) DASONDHI *v.* MILKHI RAM. **181 I.C. 703=11 R.L. 878=41 P.L.R. 670=A.I.R. 1939 Lah. 152.**

——**S. 90**—*Due execution—Proof of—Production of copy of old sale deed—Sufficient other evidence in support of sale deed—Effect.*

If a plaintiff in a suit for possession does nothing more than produce a certified copy of the original sale deed in his favour which was more than 30 years old, he would not succeed in establishing his title to the property. But where such a plaintiff produces other evidence including that of one of the identifying witnesses of the executants of the old sale deed it can be held that the evidence is sufficient to prove the due execution of the sale deed in question. (*Thom, C.J.*) ASAFUDDAULA BEG *v.* RAM NARAIN. **1939 A.L.J. 1023=1939 A.W.R. (H.C.) 884=A.I.R. 1940 All. 74.**

——**S. 90**—*Entry in school register—Register over 30 years old—Presumption of genuineness.*

A school register was produced in evidence and reliance was placed on certain entries in the register. The person making the entries could not however be produced as a witness. The register was over 30 years old and was produced from proper custody.

Held, that a presumption of genuineness attaches to the register and the fact that the person responsible for the entries was not produced as a witness was immaterial. (*Jai Lal and Sale, JJ.*) PARMODH CHAND *v.* NARAIN SINGH. **163 I.C. 81=8 R.L. 991=A.I.R. 1936 Lah. 104.**

——**S. 90**—*Execution and contents of lost ancient document are not proved merely by production of 30 years' old copy—With other evidence it may raise presumption of genuineness of original.*

The execution and contents of a lost ancient document cannot be proved merely by the production of a copy, which itself is over 30 years old; but this copy, considered with the other evidence, may give rise to a presumption as to the

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genuineness of the original. (*Tek Chand, J.*) HANS RAJ *v.* BANARSI LAL. 175 I.C. 755=11 R. L. 56=A.I.R. 1937 Lah. 920.

——S. 90—*Genuineness of copy—Presumption.*

The Court can make a presumption about the genuineness of a copy if such presumption is justified by the facts and circumstances. Such a presumption can be made where the original document was registered and was referred to in the document admitted by the opposite party which was executed on the same day. (*Darling, S.M. and Bomford, J.M.*) TRIBHUWAN BAHADUR SINGH *v.* RAM RATAN. 1937 R.D. 133.

——S 90—*Old deed conferring under-proprietary rights produced for first time in suit—Presumption of genuineness—Duty of Court.*

The Court should be very careful about raising any presumption under S. 90 of the Evidence Act in favour of old deeds of *shankalap* which never saw the light of day until they were produced during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. 9 O.W.N. 379, Rel. on. (*Nanavutty and Smith, JJ.*) SRI PRASAD *v.* SPECIAL MANAGER, COURT OF WARDS, BALARAMPUR. 12 Luck. 400=164 I.C. 494=1936 R D. 408=9 R.O. 75=1936 O.W.N. 768=1936 O.L.R. 467=A.I.R. 1937 Oudh 194.

——S. 90—Pandah's bahis—When admissible. *See* EVIDENCE ACT, Ss. 32 (5) AND (6) AND 90. A. I.R. 1940 Lah. 245.

——S. 90—*Period of 30 years—Calculation of—Starting point—Date of filing in Court or date of tendering in evidence.*

The period of 30 years, under S. 90 of the Act, is to be reckoned not from the date upon which the deed is filed in the Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes subject of proof. 5 C.L.R. 135, Foll. (*Sir George Rankin.*) SURENDRA KRISHNA ROY *v.* MIRZA MAHAMMAD SYED ALI. 63 I.A. 85=8 R.P.C. 133=1936 P. W.N. 159=1936 All.L.R. 91=1936 O.L.R. 60= 19 N.L J. 29=160 I.C. 29=1936 M.W.N. 22= 1936 A.L.J. 84=38 Bom.L.R. 330=63 C.L.J. 29 =1936 A.W.R. 45=38 P.L.R 19=40 C.W.N. 226=43 L.W. 107=1936 O.W.N. 10=A.I.R. 1936 P.C. 15=70 M.L.J. 206 (P.C.).

——S. 90—*Period of 30 years—Mode of reckoning.*

Under S. 90 of the Evidence Act, the period of 30 years is to be reckoned, not from the date of the judgment of the trial Judge, but from the date on which, the deed having been tendered in evidence, its genuineness or otherwise becomes subject of proof. A.I.R. 1936 P.C. 15, Foll. (*Tek Chand, J.*) NATHA SINGH *v.* DALIP SINGH. 169 I.C. 402=10 R.L. 6=39 P.L.R. 340.

——S. 90—*Presumption under—Applicability—Ancient document not acted on—Document conferring under-proprietary rights.*

The mere production of an ancient document, unless supported by some corroborative evidence of acting under it, is not entitled to any weight. Where a patta on the basis of which under-proprietary rights are claimed by a defendant in a suit was never acted upon, and though sub-settlement of the village in question was made with the defendant's predecessors at the first summary settlement, no claim to under-proprietary rights was put forward by them at the second summary settlement or any subsequent settlement, and the

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defendant's predecessors had been actually executing kabuliyats as the kadars in favour of the talukdar admitting them in unmistakable terms that they possessed no proprietary or under-proprietary rights in the villages, the presumption under S. 90 of the Evidence Act cannot be extended to the patta as all the facts enumerated above are totally inconsistent with the alleged under-proprietary rights in the defendant's predecessors. (*Zia-ul-Hasan and Smith, JJ.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* LAL BAHADUR SINGH. 1937 R.D. 88=166 I.C. 930=9 R.O. 346=1937 O.L.R. 72 (2)=1937 O.W.N. 179= A.I.R. 1937 Oudh 353.

——S. 90—*Presumption under—Application of—Discretion of Court—Interference in second appeal.*

It has been repeatedly laid down that the rule of presumption must be applied with great caution and ancient documents which are unsupported by any evidence that might free them from the suspicion of being fabricated should not be acted upon. Where the Courts below have acted in accordance with this principle, it is not open to the High Court in second appeal to interfere lightly with the exercise of their discretion. (*Monroe and Rangi Lal, JJ.*) SARDARA *v.* AKBAR. 166 I.C. 882=9 R.L. 431 (1)=38 P.L R. 322= A.I.R. 1937 Lah. 17.

——S. 90—*Presumption under—Court if bound to draw.*

The presumption under S. 90 of the Evidence Act is not one which the Court must draw. The Court has a discretion in the matter. (*Bennet and Ganga Nath, JJ.*) JALESHWARI PRATAP NARAIN SINGH *v.* PATESHWARI BAKSH SINGH. 175 I.C. 594=10 R.A. 705=1938 A.L.R. 456=1938 A.W. R. (H.C.) 284=A.I.R. 1938 All. 345.

——S. 90—*Presumption under—Discretion—Interference—Appellate Court.*

It is a matter eminently within the discretion of a trial Court, that of raising a presumption under S. 90 of the Evidence Act and when it has not acted arbitrarily in the exercise of that discretion, it should not be interfered with by the appellate Court. (*Hamilton, J.*) RAGHUBIR SINGH *v.* SUKHRAJ KUAR. 14 Luck. 393=179 I. C. 596=11 R O. 190=1939 O.L.R. 57=1939 O. W.N. 1=1939 O.A. 128=1939 A.W.R. (C.C.) 7=A.I.R. 1939 Oudh 96.

——S. 90—*Presumption under—Discretion of Court.*

The presumption referred under S. 90 of the Evidence Act is one which the Court is competent to make and notwithstanding the fact that the elements which are mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. (*Wazir, J.*) SUKHRAMDAS SHAH *v.* MT. MANDAN. 40 P.L R. J. & K. 51.

——S. 90—*Presumption under—Document not purporting to be signed by executant.*

Under S. 90 of the Evidence Act, there can be no presumption that a document more than thirty years old is executed by the executant, if the document does not even purport to be signed by the executant. (*Abdul Rashid, J.*) CHIRANJI LAL *v.* RAMJI LAL. 182 I.C. 1008=12 R L. 98 (2)=41 P.L.R. 108=A.I.R. 1939 Lah. 285.

——S. 90—*Presumption under—When to be raised—Discretion and duty of Court in raising.*

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The presumption under S. 90 of the Evidence Act is a rebuttable one to be made at the discretion of the Court. It is based on the rule of expediency, and unless the surrounding circumstances satisfy the Court that the document tendered has been produced from proper custody, it would be unsound to admit the document. The Court must insist....on a satisfactory account of the origin of the possession being given by the party relying upon the document. The custody may not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The soundest policy even upon the rule of expediency necessitates circumspection and scrutiny in the examination of the surrounding circumstances before raising the presumption. The Court must therefore examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the document should naturally have been.

Thakor, J.—S. 90 confers no right on any party to compel the Court to draw a presumption as regards any document purporting to be thirty years old and produced from proper custody. (*Wassoodew and Thakor, JJ.*) RUDRAGOUDA *v.* BASANGOUDA. 175 I.C. 361=10 R B. 538=40 Bom.L.R. 202=A.I.R. 1938 Bom. 257.

——S. 90—*Scope—Presumption of truth of contents of document—If justified.*

S. 90 of the Evidence Act does not involve any presumption that the contents of a document more than 30 years old coming from proper custody are true. The presumption is only as regards due execution. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. 17 Mys L.J. 510.

——S. 90—*Scope and effect of—Presumption of truth of contents of documents—If arises.*

Under S. 90 of the Evidence Act, documents more than thirty years old coming from proper custody prove themselves, but there is no presumption that the contents of the documents are true. (*Beaumont, C. J. and Sen, J.*) CHANDULAL ASHARAM *v.* BAI KASHI. I.L.R. (1939) Bom. 97 =179 I C. 697=11 R B. 258=40 Bom.L.R. 1262 =A.I.R. 1939 Bom. 59.

——Ss. 91 and 92—*Admissibility of external evidence—Endorsement of payment on bond—Oral evidence to show payment was towards interest—Admissibility.*

Where an endorsement of payment has been made on the back of a bond and it does not specify whether it was towards principal or interest, Ss. 91 and 92 of the Evidence Act would stand in the way of the admission of any oral evidence to show that the payment was in fact made towards interest. (*Thomas, C. J. and Yorke, J.*) ZAMAN KHAN *v.* GANGA. 14 Luck. 456=180 I C. 121=11 R.O. 230=1939 O.A. 238 =1939 O.L.R. 117=1939 O.W.N. 201=A.I.R. 1939 Oudh 142.

——S. 91—*Admissibility of oral evidence—Document signed by a party—Oral evidence that another person also is bound by it.*

Even though a contract in writing was signed only by a certain party, oral evidence could be added to show that another person was also a party to the arrangement or was bound by it. (*Varadachariar and Stodart, JJ.*) MUNISWAMI NAIDU *v.* THANDAVARAYA MUDALIAR. 8 R.M. 588=159 I.C. 1005=43 L.W. 218=1935 M.W.N. 1084 (2)=A.I.R. 1936 Mad. 5.

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——Ss. 91 and 92—*Admissibility of oral evidence—Oral evidence that document executed was never intended to operate as agreement—Admissibility.*

S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also S. 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter. Even if there were no provisos to Ss. 91 and 92, there is nothing in either section to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract. (*Sir John Wallis.*) TYAGARAJA MUDALIAR *v.* VEDATHANNI. 63 I.A. 126=59 Mad. 446 =63 C.L.J. 353=1936 A L.J. 136=40 C.W.N. 353=8 R P.C. 149=160 I C. 384=1936 O.W.N. 120=43 L.W. 271=1936 A.W R. 242=38 P.L.R. 156=38 Bom.L.R. 373=19 N.L.J. 104=1936 M. W.N. 310=1936 O.L.R. 93=1936 All. L R. 157= 1936 P.W.N. 200=A.I.R. 1936 P.C. 70=70 M. L.J. 232 (P.C).

——S. 91—*Applicability—Prior oral sale of property worth less than Rs.* 100—*Payment of price and delivery of possession—Subsequent unregistered sale-deed—Validity of sale—Proof of oral sale—If barred.*

When there has been an oral sale of property worth less than one hundred rupees by payment of the price and delivery of possession, the fact that some time later an unregistered sale-deed is passed on to the vendee does not prevent evidence of the oral sale being adduced. In such a case it will be a very artificial application of S. 91 of the Evidence Act to say that the contract of sale is contained only in the unregistered sale-deed and that there could be no other proof of the sale. There being a prior oral sale and delivery of possession sufficiently dissociated from the later unregistered sale-deed, the non-registration of the deed is not fatal to the validity of the transfer. (*Varadachariar and Horwill, JJ.*) CHINNASAMI CHETTY *v.* MANICKAMMAL. 168 I. C. 681=9 R.M. 619=1937 M W.N. 536=44 L. W. 949=A.I.R. 1937 Mad. 265.

——S. 91—Applicability—Suit for redemption of mortgage and possession—Mortgage for over Rs. 100 not registered—Oral evidence—Admissibility. *See* REGISTRATION ACT, S. 49. 19 Pat.L. T. 489.

——Ss. 91 and 92—*Applicability to wills—Registered will—Revocation by an unregistered document.*

Ss. 91 and 92 do not apply to a will as it is neither a contract, nor a grant nor a disposition of property until the death of the testator makes it operative. S. 92 (4) does not prevent the revocation of a registered will by an unregistered document. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. 182 I.C. 949=12 R.M. 190=47 L.W. 719=1938 M.W.N. 699=A.I.R. 1938 Mad. 616=(1938) 1 M.L.J. 444.

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——Ss. 91 and 63 (5)—*Compromise reduced to writing—Oral evidence— Admissibility—Secondary evidence.*

Where the terms of an agreement to compromise are reduced to writing, under S. 91 of the Evidence Act, no evidence can be given in proof of its terms except the document itself or secondary evidence of its contents. Oral accounts of the contents of a document could under S. 63 (5) of the Act be given by some one who has seen it. himself. (*Pollock, J.*) TRIMBAK NARAYAN *v.* YADORAO. 186 I.C. 851=12 R.N. 260=1940 N.L. J. 85=A.I.R. 1940 Nag. 116.

——S. 91—Kabuliyat *showing contract by lessor to give khas possession—Oral evidence to prove other arrangement—Admissibility.*

Where it is clear from the terms of the *kabuliyat* that the contract was that the lessee would get khas possession of the lands, oral evidence to show that there was any other arrangement between the parties is not admissible under S. 91. (*Jack, J.*) NABIN CHANDRA ROY *v.* RAJENDRA KUMAR NAG. 166 I.C. 567=9 R.C. 552=A.I.R. 1936 Cal. 302.

——S. 91—*Lease— Lease of house for eight months reduced to writing but not registered—Admissibility—T. P. Act, S.* 107.

Where a lease of a house for eight months is reduced to writing it is under S. 107 of the T. P. Act compulsorily registrable and as such, if it is not registered it cannot be admitted in evidence and no other evidence of the terms of the tenancy is admissible. (*Yorke, J.*) MRS. J. H. MATHEWS *v.* MIRZA ISMAIL BEG. 1938 O.A. 785=1938 O.W. N. 1080.

——S. 91—*Lease—Written but unregistered—What all can be proved with reference to.*

S. 91 of the Evidence Act prohibits any oral evidence being given of the terms of any disposition of property which has been reduced to writing. All the agreed arrangements in a document will be incapable of proof by oral evidence. But that does not mean that external matters existing apart from the document are not provable. If therefore a rate of rent has been agreed upon between the parties and recorded in an unregistered lease, no oral evidence may be given of that agreed rate. But if rent has been paid, there is nothing in the section to prevent proof of that payment being adduced independently of the document. In the same way, if as a matter of fact the parties are related to each other as landlord and tenant, that fact also can be proved by oral evidence. S. 91 is not intended to prevent persons giving evidence of facts which are in actual existence quite apart from any documentary evidence on the subject. (*Davies.*) KAMAL MOHAMMAD *v.* MST. ZUBEDA. 1939 A.M.L.J. 148.

——S. 91—*Partition — Unregistered deed — Other evidence, if inadmissible.*

Where an unregistered partition deed is relied upon by the defence in a partition action, though the deed may be inadmissible in evidence, being unregistered, that does not prevent any other evidence being admissible to prove merely the factum of separation in order to defeat the plaintiff's claim. (*Wort, Ag. C. J. and Manohar Lall, J.*) SULEIMAN TIGG *v.* CYRIL TIGG. 177 I.C. 682=1938 P.W.N. 799=5 B.R. 5=11 R.P. 177 =A.I.R. 1938 Pat. 603.

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——Ss. 91 and 92—Promissory note for debt—Debt barred by limitation on date of note—Absence of specific recital that the promise is to pay such barred debt—Oral evidence to connect promise to pay with prior loan—Admissibility. *See* CONTRACT ACT, S. 25 (3). 63 Cal. 759.

——S. 91—*Promissory note inadmissible in evidence—Agreement to pay interest contained in promissory note—Oral evidence—Admissibility.*

Where a promissory note is inadmissible in evidence as being insufficiently stamped, and the rate of interest is mentioned in the promissory note, being a term of the contract reduced to writing, S. 91 precludes the plaintiff suing on an oral agreement of loan from adducing any proof of that agreement otherwise than by the promissory note itself and the interest can at best be allowed under S. 73, Contract Act, by way of damages. (*Stone, C. J. and Niyogi, J.*) ANANDA NAMDEO *v.* PUNDALIK TUKARAM CHAUDHARY. 167 I.C. 673=9 R.N. 196=A.I.R. 1936 Nag. 225.

——S. 91—*Promissory note inadmissible in evidence—Debt, if can be independently proved.*

Where a contract is wholly contained in a pro-note, which is inadmissible in evidence, the person suing on the pro-note is precluded from proving the debt independently of the pro-note. (*Jolly, Offg. J.C. and Saad-ud-Din Khan, A. J. C.*) R. K. RADHU & Co. *v.* MATHRA DAS. 169 I.C. 803=10 R. Pesh. 8=A I.R. 1936 Pesh. 146.

——S. 91—*Promissory note—Inadmissibility for want of proper stamp—Suit on original consideration—Maintainability —Loan and note part of same transaction—If precludes suit on loan.*

Although a loan and a promissory note for the loan form part of the same transaction, a suit will lie on the original consideration. If there is a loan, that itself gives a cause of action, and the fact that there is a loan can never be a term of the contract contained in the promissory note, it is therefore open to the creditor to prove that there was a loan independently of S. 91 of the Evidence Act. It does not matter whether the loan was made at the same time as the promissory note which is the evidence of it or whether it is not properly stamped and therefore inadmissible in evidence. (*Rangnekar, J.*) SOMABHAI *v.* KALYANBHAI. 40 Bom.L.R. 174=175 I.C. 540= 10 R.B. 567=A.I.R. 1938 Bom. 286.

——S. 91—*Promissory note inadmissible in evidence—Suit on loan without mention of promissory note—Maintainability—Claim to interest —Proof.*

A person who lends money and takes a promissory note for it is not precluded from suing for the debt independently of the promissory note, even though the loan and the execution of the promissory note are contemporaneous. The acceptance of a promissory note or other negotiable instrument operates in law only as a conditional discharge and not as an absolute discharge. If the promissory note is insufficiently stamped and inadmissible in evidence on that account, the lender can sue for the debt independently of the promissory note. He need not even mention the existence of the promissory note in his plaint. S. 91 of the Evidence Act is no bar to the suit on the debt. It only prevents the plaintiff from claiming interest on the debt, as the promise to pay interest contained in the promissory note cannot be proved by oral evidence, (*Norman,*

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I.C.S.) ONKAR BALLABH *v.* GIRWAR LAL. 1936 A. M.L.J. 37.

——S. 91 — *Promissory note — Insufficiently stamped—Admissibility of—Suit on debt—Maintainability—Stamp Act, S. 35—Effect of.*

Held, by the Full Bench (Stodart, J., dissenting), that the answer to the question whether a person who has lent money on a promissory note, which is inadmissible in evidence owing to defect in the stamping, can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security or by way of conditional payment or if the note does not embody all the terms of the contract the true nature of the transaction can be proved. But if the promissory note embodies all the terms of the contract, no suit on the debt will lie as S. 91 of the Evidence Act and S. 35 of the Stamp Act bar the way. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot, however, exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. (*Leach, C. J., Madhavan Nair, Varadachariar, Lakshmana Rao and Stodart, JJ.*) PERUMAL CHETTIAR *v.* KAMAKSHI AMMAL. I.L.R. (1938) Mad. 933=177 I.C. 236=11 R.M. 291=48 L.W. 220=1938 M.W.N. 722=A.I.R. 1938 Mad. 785=(1938) 2 M.L.J. 189 (F.B.).

——S. 91—*Promissory note insufficiently stamped—Proof of liability by oral evidence—Permissibility.*

Where a promissory note is executed in satisfaction of a pre-existing liability, the inadmissibility of the promissory note by reason of its being deficiently stamped does not preclude the proof of the pre-existing liability by oral evidence. When the loan is contemporaneous with the execution of an inadmissible promissory note, the debt can be proved by oral evidence independently of the promissory note only if the parties intended at the time of the execution of the promissory note that it was collateral to an oral contract by way of giving security for the loan or making conditional payment of the debt, antecedent or contemporaneous. When, however, the promissory note forms the substance of the contract with all its terms, S. 91 would preclude proof of the contract otherwise than by the document itself, and if the promissory note is inadmissible for any reason, the contract cannot be proved by any extraneous oral evidence nor can money be recovered as money had and received. (*Stone, C.J. and Niyogi, J.*) ANANDA NAMDEO *v.* PUNDALIK TUKARAM CHAUDHARY. 167 I.C. 673=9 R.N. 196=A.I.R. 1936 Nag. 225.

——S. 91—*Promissory note—Understamped—Suit on distinct oral agreement of loan—Defendant repudiating promissory note—Admissibility of note.*

Where the plaintiff conceding that an understamped promissory note is invalid for the purpose of creating an obligation, averred the existence of a distinct oral agreement of loan, and sued for money had and received by the defendant and, the defendant repudiates the promissory note as being merely a colourable document and neither party relies on the document as embodying the substance of the contract, S. 91 does not come into play, and the promissory note can be used as the corroborative evidence on the point of the actual payment of money. (*Stone, C.J. and Nyogi, J.,*) ANANDA NAMDEO *v.* PUNDALIK TUKARAM CHAUDHARY. 167 I.C. 673=9 R.N. 196=A.I.R. 1936 Nag. 225.

——S. 91—*Sale of goods—Execution of promissory note for sale price—Note unstamped—Right to decree on basis of original transaction of sale.*

In cases where a promissory note is given in payment for goods sold and delivered, the presumption would be that the note is given in conditional payment for the goods sold and delivered. In such cases, when the note is inadmissible as being unstamped, the original debt can be availed of by the seller for the purpose of recovering the amount due to him, irrespective of the promissory note.

Per *Beasley, C.J. and Pandrang Rao J. (Cornish, J.*, contra.)—Where the promissory note is part and parcel of the transaction of loan, and itself contains all the terms, it must, in the absence of evidence to the contrary, be taken to be the contract, and no contract *aliunde* can be proved. (*Beasley, C.J. Cornish and Pandrang Rao, JJ.*) RAMASAMY PILLAI *v.* MURUGIAH PADAYACHI. 59 Mad. 268=161 I.C. 273=8 R.M. 809=43 L.W. 145=1935 M.W.N. 855=A.I.R. 1936 Mad. 179=70 M.L.J. 267 (F.B.).

——S. 91—Scope—Contract compulsorily registrable but not registered—Oral evidence of terms—Admissibility. *See* EVIDENCE ACT, SS. 65 AND 91. A.I.R. 1937 Nag. 116.

——S. 91—*Scope—Promissory note adjudged void—Use of instrument to prove factum of loan—Oral evidence of loan—Admissibility.*

Where the making of a promissory note and the payment of money under it are concurrent conditions and part and parcel of the same transaction, the creditor cannot when the instrument is adjudged void, prove the loan by adducing oral evidence of the terms of the contract of loan. S. 91 of the Evidence Act bars the use of oral evidence in such a case. Nor can the promissory note be used as evidence to prove the factum of loan. (*Sulaiman, C.J. and Bennet, J.*) SHEO NAYAK *v.* BABAU. 169 I.C. 780=10 R.A. 82=1937 A.L.R. 602=1937 A.W.R. 232=1937 A.L.J. 235=A.I.R. 1937 All. 439.

——S. 91—Scope—Promissory note executed by co-sharer to another at partition to equalise share and as term of partition—Suit on—Oral evidence of terms of partition—Unregistered partition lists—Admissibility. *See* REGISTRATION ACT, S 49. (1937) 1 M.L.J. 676.

——S. 91—*Scope—Unstamped promissory note—Suit on original consideration—Proof of loan aliundi—If barred.*

Where there is a completed cause of action for recovery of money on foot or a distinct and separate cause of action, and a promissory note is given as collateral security, a suit can be maintained on the original cause of action, even if the promissory note in itself may not be sued upon, as being inadmissible in evidence for want of necessary stamps. It is open to the plaintiff in such a case to prove by evidence the transaction givin rise to the cause of action. S. 91 of the Evidence Act is no bar to such proof. (*Niamatullah, J.*) INAYAT ULLAH *v.* MST. HOSHYARI.

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170 I.C. 117=1937 A.L.R. 628=10 R.A. 101=1937 A.W.R. 322=1937 A.L.J. 360.

——S. 91—*Scope—Suit for possession—Unregistered patta and rent receipts—Admissibility to prove title—General circumstances of the case—Admissibility—Registration Act, S. 49.*

An unregistered patta cannot be admitted in evidence in a suit for possession of land for the purpose of proving the plaintiff's title. Nor can the plaintiff be allowed to prove his title by the production of rent receipts or by the general circumstances of the case. S. 49 of the Registration Act and S. 91 of the Evidence Act are a bar to such proof, and the plaintiff is not entitled to prove his title and his right to recover possession in that way. (*Wort and Manohar Lall, JJ.*) RAMAUTAR SINGH *v.* JUTHI TATMA. 18 P.L.T. 1012.

——S. 91—*Scope—Written contract—Oral evidence to prove—Admissibility.*

Once the terms of a contract are embodied into writing, the terms being reduced to writing at the same time when it is made, oral evidence is not admissible to prove that contract under S. 91 of the Evidence Act. (*Mohamad Noor and Dhavle, JJ.*) JANARDAN PARIDA *v.* PRANDHAN DAS. 190 I.C. 377=5 C.L.T. 45=A.I.R. 1940 Pat. 245.

——Ss. 91 and 92—*Scope and effect of—Oral evidence that document not intended to be acted upon—Admissibility.*

S. 91 of the Evidence Act only excludes oral evidence as to the terms af a written contract. S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. There is nothing in either section to exclude oral evidence to show that there was no agreement between the parties and therefore no contract. Oral evidence is therefore permissible to show that a document executed by a party was never intended to operate as an agreement, but was a sham or fictitious document brought into existence solely for the purpose of creating evidence about some other matter. (*Ganga Nath, J.*) BISHAMBAR DAS *v.* RAM CHANDRA. 1938 A.L.R. 215=173 I.C. 949=10 R.A. 530=1937 A.L.J. 1352=1938 A.W.R. 8 (H.C.)=A..I.R. 1938 All. 132.

——Ss. 91 and 92—Usufructuary mortgage and lease back—Separate deed charging rent on equity of redemption—Evidence to prove that documents are one transaction and amount only to simple mortgage—Admissibility. *See* AGRA TENANCY ACT, S. 216. 1936 R.D. 2.

——S. 91, Ill. (b)—*Promissory note—Suit on—Note inadmissible for deficiency in stamp—Right to decree on original consideration.*

It is of the very essence of a negotiable instrument that it is but a conditional payment and does not supersede or destroy the original right that springs up from the contract of loan. Ill. (*b*) to S. 91 of the Evidence Act cannot be taken to have the effect of abrogating or annulling the well settled rule of English law that a negotiable instrument operates only as a conditional discharge. The section does not mean or imply that a promissory note or bill either destroys or supersedes the original debt; to so hold would amount to holding that a rule of evidence overrides a well settled principle of substantive law. Consequently, even when the loan is not antecedent to, and independent of the bill or note, but is contemporaneous with it, the lender can, when the note, turns out to be invalid, fall back upon the original contract, express or implied, arising from the loan, and can get a decree on that basis. (*Venkatasubba Rao, J.*) CHINNAYA NAIDU *v.* SRINIVASA NAIDU. 160 I C. 1069=8 R.M. 755=43 L.W. 48.

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——S. 92—*Applicability—Decrees.*

Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible for the purpose of interpreting the decree, S. 92 of the Evidence Act does not govern decrees. (*Bhide, J.*) NAZIR MAHOMED KHAN *v.* ABDUL GHANI. 165 I.C. 429=9 R.L. 248=A.I.R. 1937 Lah. 168.

——S 92—*Applicability—If limited to parties and representatives.*

S. 92 of the Evidence Act applies only as between the parties to a transaction and those claiming under them respectively. (*Varadachariar and Abdur Rahman, JJ.*) SURAYYA *v.* MANGAYYA. 1940 M.W.N. 19.

——S. 92—Applicability — Pre-emption suits. *See* PRE-EMPTION—CIRCUMVENTION OF. 1938 A. L.J. 668.

——S. 92—*Construction of deed—Intention of parties—Oral evidence—Admissibility.*

External evidence as to the intention of the parties to a deed is not admissible and oral evidence of intention is inadmissible for the purpose of construing the deed or ascertaining the intention of the parties. 22 A. 149, Rel. on. (*Ba U and Parker, JJ.*) U THIN *v.* DAW HMU. 171 I.C. 702=10 R.R. 179=A.I.R. 1937 Rang. 142.

——S. 92—*Construction of document—Evidence of conduct or intention of parties—Admissibility.*

Extrinsic evidence as regards the conduct of parties is excluded under S. 92 of the Evidence Act in coming to a conclusion in regard to the intention of the parties executing a document, unless there is ambiguity in the language used in the document. The Courts are practically limited to the document itself to construe what the intention of the parties was. Where the deed itself is silent or its language is ambiguous, the operation of its terms and conditions and any other relevant circumstances from which the probable intention of the parties may be reasonably inferred, may be taken into consideration. (*Abdul Ghani, C.J. and Venkataranga Iyengar, J.*) SUBBANARAYANA *v.* RAMACHANDRA RAO. 18 Mys.L. J. 196.

——S. 92—*Document—Recital of fact—Whether could be contradicted — Consideration—Whether evidence of absence or failure could be let in.*

S. 92 of the Indian Evidence Act debars a person who is a party to a contract from adducing any evidence which may "contradict, vary, add to or subtract from its terms", but there is no justification for holding that the recitals of facts mentioned in the document cannot be contradicted by evidence. Where a particular document in question stated a fact that the plaintiff was a relation of the defendant and the plaintiff herself denied it in the box it cannot be urged with justification that the defendant would not be able to traverse this recital again. Evidence of the

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absence or failure of consideration for a document could always be adduced under proviso (1) of S. 92, even if the document had mentioned any consideration. (*Abdur Rahman, J.*) MAHALAKSHMI AMMA *v* KRISHNA HOLLA. 174 I.C. 309=10 R.M. 695=1938 M.W.N. 1142=A.I.R. 1938 Mad 320=(1938) 1 M L.J. 236.

——S. 92—*Document evidencing loan—Purpose of loan—Oral evidence as to—Admissibility.*

When a loan has been taken and is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was and especially when the document is silent on the point. By such oral evidence the terms of the document are not varied (*Mitter and Khundkar, JJ.*) KISTUR CHAND TEWARI *v.* RAJANI KANTA MUKHERJEE. 186 I.C. 891=12 R.C. 535=70 C.L.J. 201=44 C.W.N. 299=A.I.R 1940 Cal. 137.

——Ss. 92 and 91—Document not intended to be acted upon—Oral evidence to prove—Admissibility. *See* EVIDENCE ACT, SS. 91 AND 92—ADMISSIBILITY OF ORAL EVIDENCE. 63 I.A. 126=70 M. L.J. 232 (P.C.).

——S. 92—*Document not intended to be acted upon—Suit for dower amount mentioned in* kabin nama*—Oral evidence that amount was not intended to be paid—Admissibility.*

In a suit for dower the plaintiff relied on a *kabin nama* in which the dower amount was mentioned but the defendant pleaded that the writing was a mere sham and that the amount mentioned therein, was nominal and that no effect should be given to it.

Held: Per *Agha Haider, J.*—Oral evidence to prove such plea was not admissible as S. 92, is a bar.

Held: Per *Tek Chand, J.*—S. 92 was no bar as S. 92 operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement, but that oral evidence is admissible to prove that the agreement in writing was not an agreement at all, but was only a sham and was not intended to be operative. (*Tek Chand and Agha Haider, JJ.*) MAHOMED SULTAN BEGAM *v.* SARAJ-UD-DIN AHMAD. 161 I.C. 300=8 R.L. 709=38 P.L.R. 337=A.I.R. 1936 Lah. 183.

——Ss. 92 and 94—*Intention of parties—Oral evidence—Admissibility—Conditions.*

Where the surrounding circumstances are not so compelling as to lead inevitably to the conclusion that there had been an inadvertent misdescription of property in a mortgage deed in suit and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document, the mortgagees are barred by the provisions of Ss. 92 and 94 of the Evidence Act from showing that the intention of the parties was different from what appears from the terms of the mortgage deed itself. (*Collister and Bajpai, JJ.*) GOBIND BEHARI *v.* SHUJAAT MAND KHAN. I.L.R (1938) All. 494=1938 A.L.J. 477=1938 A.W.R. (H.C.) 304=176 I.C. 81=11 R,A. 29=1938 A L.R. 537=A.I.R 1938 All 364.

——S. 92—Mistake—Palpable error—Equity, if sanctions admission of evidence to expose error. *See* SURETY BOND—CORRECTION. A.I.R. 1938 Nag. 259.

——S. 92—*Mortgage—Suit for sale—Plea of oral agreement by mortgagee to accept smaller amount and to take certain properties on sale in full discharge—Evidence to prove—Admissibility.*

It is open to a debtor to plead and prove an actual discharge in a manner or on terms different from those contemplated by or provided for in the document evidencing the debt. S. 92 of the Evidence Act does not preclude evidence being adduced in a suit for sale on a mortgage in proof of an oral arrangement, otherwise valid and enforceable, under which the mortgagee orally agreed that the mortgage amount should be settled at a figure less than the amount actually due on the mortgage, and that in full discharge of his claim under the mortgage the mortgagee would purchase certain properties included in the mortgage. Such an arrangement does not contradict, vary, add to or subtract from the mortgage document.

Quaere.—Whether, when the agreement admittedly remained executory, it could, even if it be found to be true and valid, be a defence to the action? (*Varadachariar and Horwill. JJ*) KRISHNASWAMI RAO *v.* SRINIVASA DESIKAN. 168 I. C. 699=9 R.M. 621=44 L.W. 944=A.I.R. 1937 Mad. 261=71 M.L.J. 850.

——S. 92—*Mortgage of holding—Deed making mortgagee liable for rent — Subsequent oral agreement making mortgagor liable—Admissibility.*

Where under a registered deed of usufructuary mortgage of a holding, the mortgagee is liable to pay rent to the landlord, a subsequent oral agreement making the mortgagor liable for the rent is inadmissible under S. 92 of the Evidence Act, (*Wort, Ag. C.J.*) BUDHU *v.* SITAL SINGH. 5 B. R. 202=11 R.P. 331=179 I.C. 172=A.I.R. 1939 Pat. 142.

——S. 92—*Mortgage with possession—Deed providing for redemption on payment of "entire mortgage money"—Subsequent oral agreement for delivery of possession on payment of portion —Admissibility—Court, if precluded from coming to a finding as to nature of mortgagor's possession.*

Where in a case of a mortgage with possession, the deed provides that redemption would be effected on payment of the "entire mortgage money" by the mortgagor, evidence of a subsequent oral agreement for delivery of possession of the property to the mortgagor on payment by him of a portion of the mortgage money is, no doubt, inadmissible under S. 92 of the Evidence Act. But this does not preclude the Court from coming to a finding on the question of fact whether the mortgagor's possession of the property was unlawful or by consent of parties. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) AZIZ UDDIN *v.* ARIFA BEGAM. 12 Luck. 563=165 I.C. 718=9 R.O. 241=1936 O.W.N. 1086=1936 O.L.R. 679=A.I.R. 1937 Oudh 1.

——S. 92—*Mortgage with possession—Evidence that parties intended to effect simple mortgage—Admissibility.*

Where the document is in terms a mortgage with possession, evidence to show that the intention of the parties was to effect a simple mortgage is inadmissible under S. 92 of the Evidence Act. (*Almond, J.C. and Mir Ahmad, A.J.C.*) MT. MANOHARI *v.* KHALIL KHAN. 165 I.C. 510=9 R. Pesh. 47.

EVIDENCE ACT (1872), S. 92.

——S. 92—*Parties and representatives—Mortgagee of several lots of properties validly releasing some of them orally—Released lots sold by mortgagor to third party—Subsequent mortgagee—If can contend against admissibility of oral release.*

Where a mortgagee of a series of lots of landed properties validly released some of them by word of mouth and the released lots were then sold by the mortgagor to a third party, it is not open to a second mortgagee whose mortgage was executed subsequent to this sale to contend that S. 92 of the Evidence Act precluded any evidence being led to show that an oral release had in fact been granted by the first mortgagee. The section excludes oral evidence of the contents of a written contract between the parties to the instrument or their representatives in interest only. The second mortgagee is not a representative in interest of either of the parties to the first mortgage, and their only representatives in interest are the purchasers of the lots sold. (*Roberts, C.J. and Leach, J.*) S. N. V. R. CHETTYAR FIRM *v.* K. Y. A. CHETTYAR FIRM. (1937) Rang.L.R. 13 =171 I.C. 168=10 R.R. 135=A.I.R. 1937 Rang. 220.

——S. 92—*Partition—Oral evidence—Admissibility—Test—Receipts referring to partition 'lists'.*

It is perhaps a moot point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous, but if there is doubt then it is permissible. Though mere lists of property do not form instruments of partition, it has to be determined in each case whether these documents are mere lists or in themselves purport 'to create, declare, assign, limit or extinguish. . . . . any right, title or interest' in the property. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR. I.L.R. (1938) Nag. 604=1938 N.L.J. 82=11 R.N. 219=178 I.C. 293=A.I.R. 1938 Nag. 434.

——S. 92—*Principals, if can show they signed as sureties.*

Persons who have in terms signed a bond as principals are prohibited by S. 92 of the Evidence Act from adducing oral evidence to show that they signed only as sureties. (*D. R. Norman.*) SHANKAR LAL *v.* BHANWAR LAL. 1939 A.M.L.J. 84.

——S. 92—*Promissory note—Consideration—Real nature of—Proof—Admissibility.*

A promissory note stated that the entire consideration had been paid in cash, but the promisee subsequently stated that a part of the consideration was on account of the pre-existing debts due to him.

Held, that the promisee could prove that the actual consideration was something different from that recited in the document, but effect must be given to the real consideration and the contract falling under S. 25 (3) was no exception to this rule. (*Tek Chand, J.*) SADHURA SINGH *v.* KEHR SINGH. 169 I.C. 228=9 R.L.725=39 P.L.R. 396=A.I.R. 1936 Lah. 1016.

EVIDENCE ACT (1872), S 92.

——S. 92—*Promissory note—Executant—Evidence that he signed as surety—Admissibility.*

Evidence to prove that some executants of the promissory note signed in the capacity of surety only is inadmissible under S. 92, Evidence Act. Even where the contention is that one of the debtors signed as surety to the knowledge of the promisee, evidence to prove it is not admissible; and when in spite of such agreement of suretyship as between executants, they sign the document as co-debtors, the agreement amongst the co-debtors cannot affect the right of the promise. A.I.R. 1927 Rang. 199, Rel. on.

Obiter.—Where there was an expressly alleged fraud, such as that the promisee induced the surety to sign as executant or that he promised not to sue him except as such, then proviso (1) to S. 92 would come into operation. A.I.R. 1924 Rang. 360, Expl. (*Mosely, J.*) U PE *v.* U CHIT HMUN. 168 I.C.477=9 R.R. 358=A.I.R. 1937 Rang. 82.

——S. 92—*Sale-deed—Oral agreement to vary consideration—Admissibility—Contemporaneous oral agreement on collateral matter—If admissible.*

Any evidence (oral or documentary) of any oral agreement to vary the amount of consideration mentioned in a sale-deed is inadmissible as between the parties to it. The parties, however, are not prevented from proving that either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matters on which the sale-deed is silent. (*Guha and Bartley, JJ.*) NAGENDRA NANDINI DASSI *v.* BHOLANATH KHAMARU. 169 I.C. 1002=10 R.C. 66=65 C.L.J. 225=41 C.W.N. 734.

——S. 92—*Scope—Fictitious nature of document—Statement as to—Admissibility.*

S. 92 of the Evidence Act deals with the contradiction, or variation or addition to or subtraction from the terms of a document and not with an allegation regarding the nature of the document itself. Accordingly a statement by a party as to the fictitious nature of a document is not inadmissible owing to the provisions of that section. (*Thomas and Zia-ul-Hasan, JJ.*) RAM BHAROSE *v.* RAMESHWAR PRASAD SINGH. 13 Luck. 697=10 R.O. 126=171 I.C. 481=1937 O.L.R. 561=1937 O.W.N. 1058=A.I.R. 1938 Oudh 26.

——S 92—*Scope—Mortgage bond fixing term—Suit on—Plea of loan and banking transaction between parties after mortgage and of over-payment—Oral agreement to set-off balance towards mortgage debt—Admissibility in evidence.*

A registered mortgage-deed provided *inter alia* that "the period fixed for this bond is three years. Every year we shall pay interest and get the same endorsed on this bond. Immediately after the expiry of the time fixed, we shall pay both the principal and the interest then due thereon." In a suit on the mortgage for the principal and interest due thereon, the mortgagor pleaded *inter alia*, that after the mortgage, he went on having loan and banking transactions with the mortgagee, and that the amounts paid by him to the mortgagee in the course of such transactions so far exceeded the loan as to wipe off the whole mortgage-debt, if the balance were set-off against the mortgage-debt, and that though a term of

three years was mentioned in the mortgage-deed, there was an oral agreement between the mortgagor and the mortgagee that the balance of these transactions from time to time in favour of the mortgagor should be set-off with interest at the same rate as that fixed in the mortgage-deed against the mortgage-debt.

Held, that the plea was not open and that S. 92 of the Evidence Act prohibited the defendant-mortgagor from proving the alleged oral agreement. (*Reilly, C.J. and Abdul Ghani, J.*) SHAMANNA *v.* SANATHKUMARIAH. **15 Mys. L.J. 327.**

——S. 92—*Scope—Oral evidence inconsistent with terms of document—Admissibility—Evidence to prove that deed of mortgage was really intended to be sale or* vice versa—*Admissibility.*

S. 92 of the Evidence Act excludes evidence of an inconsistent oral agreement and provides only for cases of fraud invalidating a document. Oral evidence of intention cannot be admitted for the purpose of construing deeds or ascertaining the intention of the parties. Under S. 92, evidence of acts and conduct cannot be admitted to prove that a document which is in form a sale was intended by the parties to be in fact a mortgage. Similarly extrinsic evidence cannot be admitted to prove that a document which is in fact a deed of mortgage was intended by the parties to operate as a deed of sale. (*Shankaranarayana Rao and Chari, JJ.*) PUTTASAMIAH SETTY AND SONS *v.* NAGAPPA SETTY. **15 Mys.L.J. 64=42 Mys.H.C.R. 257.**

——S. 92—*Scope—Suit on money bond—Provision for repayment in cash—Plea that payment should be made by medical services to be rendered—If open—Evidence to prove plea—Admissibility.*

In a suit on a bond providing for repayment in cash, it is not open to the defendant to set up a plea, or adduce evidence in support of that plea, to the effect that payment was not to be made by cash but by medical services to be rendered to the plaintiff by the defendant. That would in effect to set up a different contract, and is barred by S. 92 of the Evidence Act. (*Norman, I.C.S.*) SHEO NARAIN *v.* UMAID SINGHJI. **1936 AM.L.J. 107.**

——S. 92—*Scope of.*

All that S. 92 of the Evidence Act excludes is oral evidence to contradict, vary, add to or subtract from the terms of a contract which has been reduced to writing. It does not preclude a party from showing that the writing was not really the contract between the parties but was only a fictitious or colourable device which cloaked something else. (*Stone, C J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

——S. 92—*Scope—Deed stating that consideration was paid in cash—Evidence to show that consideration was paid in goods—Admissibility.*

Evidence of the manner in which the consideration was paid is not evidence tending to vary the terms of a written contract. Hence, where an assignment states that consideration for the assignment was in cash it can be shown that consideration was paid not actually in cash but in goods. (*Harries, C.J. and Manohar Lall, J.*) KISAN RAM MARWARI *v.* GODAWARI DEBI. **189 I.**

C. 423=13 R.P. 85=6 B.R. 801=A.I.R. 1940 Pat. 379.

——S. 92—*Scope — Registered lease — Oral agreement to modify—Admissibility.*

Where a lease from month to month is registered, a subsequent oral agreement which modifies the contract of the lease is not admissible in evidence. (*Wort, J.*) JADUNANDAN DAS *v.* MT. MAHO. **185 I.C. 284=6 B.R. 148=12 R.P. 337 =A.I.R. 1939 Pat. 428.**

——S. 92—*Scope—Sale deed—Title to property sold—When passes—Intention of parties—Ascertainment—External evidence—Admissibility.*

Ordinarily the title to immovable property transferred by sale passes on the registration of the sale deed although it may sometimes happen that the parties agree that title shall not pass until the consideration is completely paid. In contracts of sale there are recitals of the receipt of the purchase money as well as terms providing for the passing of the property. The strictly contractual part, that is to say, the arrangement as to when the property shall pass is, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms, as mentioned in S. 92 of the Evidence Act. The question when the property is to pass is a matter of contract. In that respect it differs from the recital of fact, *i.e.*, the passing of the consideration is on the other hand a matter of fact and not a matter of contract, and the recital of this fact is different from the former contractual part as to the passing of the property. S. 92 will not prevent a party from disputing the recitals in the sale deed. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms, then the terms must remain the sole criterion of the intention of the parties, and evidence cannot be introduced for the purpose of showing that the contract means something other than what it expresses in unambiguous terms. (*Courtney Terrell, C.J. and James, J.*) RADHAMOHAN THAKUR *v.* BIPIN BEHARI MITRA. **17 Pat. 318=178 I.C. 629=11 R.P. 282=5 B.R. 122= 20 P.L.T. 157=A.I.R. 1938 Pat. 505.**

——S. 92—*Scope—Variation of recital in contract—Oral evidence—Admissibility.*

S. 92 of the Evidence Act no doubt prevents the admissibility of evidence for contradicting or varying the terms of a document but there is nothing to prevent one of the parties to the contract from showing either that there was no consideration or that the consideration was different from that stated in the document. There is nothing in the section to exclude evidence of an oral agreement which contradicts, varies, adds or subtracts from, not the terms of the contract but some recital in it. (*Nawal Kishore, C.J.*) ABDUL GAFOOR *v.* PARSRAM. **1939 M.L.R. 12 (C.).**

——S. 92—*Third parties—A contradicting with B, alleged agent of C—Suit on contract against C—Oral evidence to show that B was acting as C's agent—Admissibility.*

EVIDENCE ACT (1872), S 92.

A entered into a contract with *B*, who as alleged by *A* was acting as agent of *C*. *A* filed a suit upon the contract against *C* on the ground that *C* was liable under the contract and adduced oral evidence in support of his allegations.

Held, that the evidence was admissible and that S. 92 did not apply as that section contemplates a case only as between the parties to the suit. (*Baguley, J.*) E HOE CHAN CO. *v.* CHOTALAL UJAMSI. 1939 Rang. L.R 622=181 I.C. 846=11 R.R. 501=A.I.R. 1939 Rang. 139.

——S. 92—*Usufructuary mortgage reduced to writing—Not registered—Oral evidence—Admissibility.*

Where a usufructuary mortgage is reduced to writing but is unregistered, no other evidence of its terms could be given because of S. 92 of the Evidence Act. (*Bose, J.*) HINDUSINGH *v.* KHETSINGH. 1938 N.L.J. 123.

——S. 92—*Wakfnama—Parties to document—Beneficiaries, if parties.*

Persons who claim to be beneficiaries under a wakfnama are parties to it within the meaning of S. 92, Evidence Act, and, therefore, in a suit by them against the wakif, the wakif cannot be allowed to give in his evidence an explanation of what he meant by the provisions of the wakfnama. (*Bennet and Harries, JJ.*) AHMAD ALI KHAN *v.* MOHAMMAD AITZAD ALI KHAN 165 I. C. 15=9 R.A. 241=1936 A.L.J. 793=1936 All.L. R. 891=1936 A.W.R. 647=A.I.R. 1936 All. 704.

——S. 92, Proviso (1)—*Applicability—Evidence contradicting written document.*

Giving evidence of a relationship between the parties which was other than and contradictory to the relationship expressed upon the written document is not permissible. (*Roberts, C.J. and Dunkley, J.*) ABDUL AZIZ *v.* MAUNG PE TINT. 189 I.C. 384=13 R.R. 36=A.I.R. 1940 Rang. 152.

——S. 92, Proviso (1)—*Applicability—Promissory note—Rate of interest—Omission of 'per cent.'—Oral evidence—Admissibility.*

Where in a printed form of a promissory note after mentioning, the interest payable, there is an omission to state that it is—per cent. oral evidence can be let in to show what was the agreement between the parties and it is a case to which proviso (1) to S. 92 of the Evidence Act applies. (*Bennet and Verma, JJ.*) KAMLA PRASAD RAM PANDY *v.* HASAN ALI KHAN. I.L.R. (1939) All. 329=184 I.C. 149=12 R.A. 181=1939 A.W.R. (H.C.) 171=1939 A.L.J. 196=A.I.R. 1939 All. 308.

——S. 92, Proviso (1)—*Consideration—Failure—Variation—Discharge of obligation in kind—Proof apart from document—Permissibility.*

Though a document says there was consideration and states exactly what it was, a party may contradict that and show that there was none or that it has failed. Though a document sets forth that the consideration has fully passed and though a party to the document admits that by signing it, nevertheless he can turn round later on and contradict the document and show that he did not receive anything at all. In the same way there is no reason why the other party should not be allowed to show that the consideration was paid in full, not in cash, but in kind. (*Bose, J.*) PANDURANG GANPATRAO *v.* VISHWANATH PANDURANG.

EVIDENCE ACT (1872), S. 92.

80 I.C. 370=11 R.N. 355=1939 N.L.J. 33=A. .R. 1939 Nag. 20.

——S. 92, Proviso (1), Illustrations—*If exhaustive.*

The wording of the proviso (1) to S. 92, Evidence Act and especially the use of the words 'such as' clearly show that the illustrations are not meant to be exhaustive (*Bose, J.*) PANDURANG GANPATRAO *v.* VISHWANATH PANDURANG. 180 I.C. 370=11 R.N. 355=1939 N.L.J. 33=A.I. R. 1939 Nag. 20.

——S. 92, Proviso. (1)—*Kabuliyat settling two hals of land at certain rate—Separate oral agreement that one of them was given rent free—Admissibility.*

Where under a Kabuliyat two *hals* of land were settled with a tenant at a certain rate, a separate oral agreement that one of the *hals* would be given rent free is not admissible in evidence, although evidence that the kabuliyat was not intended to be acted upon at all would be admissible under proviso (1) of S. 92 of the Evidence Act. (*Jack, J.*) PULIN BEHAREE DEB *v.* RAMA KANTA MAHATA KURMI. I.L.R. (1938) 1 Cal. 48=176 I.C. 972=11 R.C. 192=A.I.R. 1938 Cal. 356.

——S. 92, Proviso (1)—*Khasra numbers of land wrongly entered in sale deed—Oral evidence—Admissibility.*

Under S. 92, Proviso (1) of the Evidence Act, oral evidence is admissible to prove that the khasra numbers of the land sold were wrongly entered in the sale deed, particularly when both the vendor and the vendee admit that mutual mistake of fact had crept into the sale-deed. (*Abdul Rashid, J.*) ARYA *v.* DAUNDI. 188 I.C. 813=13 R.L. 40=42 P.L.R. 222=A.I.R. 1940 Lah. 236.

——S. 92, Proviso (1)—*Mistakes contemplated by.*

The mistakes contemplated by proviso (1) to S. 92 are genuine and accidental mistakes, just as a misdescription of the property. (*Almond, J.C. and Soofi, J.*) HAJI KHAN GUL KHAN *v.* CHOTHU RAM. 184 I.C. 585 (2)=12 R.Pesh. 29=A.I.R. 1939 Pesh. 41.

——S. 92, Proviso (1)—*Scope—Contract embodied in document—Evidence to prove mistake on the part of parties—Admissibility—Common mistake and unilateral mistake—Distinction.*

There is nothing in proviso (1) to S. 92 of the Evidence Act to suggest that the facts which may be proved under that proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded by way of defence only. The validity of every contract depends on the presence of *animus contractendi* the intention to contract. When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification on the ground that the written instrument does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such case is to rectify, not the contract, but the document embodying it, and put that document into such a form as to carry out the contract which the parties really entered into. When there is unilateral mistake, the position is different, because in that case there is, in fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intend-

ed something else, and if any relief can be granted, it must be rescission. But at that point the rule of estoppel, which is a part of the law of evidence, steps in. In the case of a unilateral mistake, therefore, it is not every mistake which would give rise to a claim to relief and serve as a defence under proviso (1) to S. 92. But when the mistake is one common to all parties, evidence would be admissible under S. 92, proviso (1) to found a claim for rectification of the contract. (*Beaumont, C.J.*) JANARDAN *v.* VENKATESH. I.L.R. (1939) Bom. 149=181 I.C. 991=11 R.B. 377=41 Bom.L.R. 191=A.I.R. 1939 Bom. 151.

——S. 92, Proviso (1)—*Scope—Deed—Evidence to show that it is an illegal transaction—Admissibility.*

An obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. The validity of a document may be challenged on the ground of the illegality of the transaction. (*Agarwala and Rowland, JJ.*) BRAHMDEO NARAYAN *v.* BRAJBALLABH PRASAD. 19 Pat. 424=188 I.C. 859=13 R.P. 51=6 B.R. 757=A.I.R. 1940 Pat. 573.

——S. 92 and Proviso (1)—*Scope—Mortgage—Plea of invalid registration—Evidence to show that property included in deed was not intended to be made security at all—Admissibility.*

In a suit on a mortgage evidence to show that certain property included in the mortgage-deed was not intended to be mortgaged and that it was included only fictitiously to secure registration in the particular sub-district, is not inadmissible under S. 92 of the Evidence Act. It is not evidence which varies the terms of the written document as between the parties and their representatives. It is evidence which goes to show that the document did not relate to land within the jurisdiction of the particular Sub-Registrar who registered it. It may well be evidence which tends to render the document invalid and hence admissible under the 1st proviso to S. 92. (*Harries, C.J. and Monohar Lall, J.*) RAMNANDAN PRASAD NARAYAN SINGH *v.* CHANDRADIP NARAIN SINGH. 19 Pat. 578=6 B.R. 485=187 I.C. 522=12 R.P. 603=A.I.R. 1940 Pat. 504.

——S. 92, Proviso (1)—*Scope and applicability—Gift.*

Proviso (1) to S. 92, has no application in a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing. Where a person transfers certain property by a deed of gift, it is not open to him to say that when he gave the property he did not do it. The donor is not himself entitled to have the deed set aside on the ground that his intention was that it should operate on his death, especially so when there is no evidence that the donor, giving away practically the whole of his property wanted to retain any sort of control after the date of gift. (*Ba U and Parker, JJ.*) U THIN *v.* DAW HMU. 171 I.C. 702=10 R.R. 179=A.I.R. 1937 Rang. 142.

——S. 92, Proviso (2)—*Contract—Oral evidence—Admissibility.*

In considering whether or not proviso 2 applies the Court shall have regard to the degree of formality of the document. If the document is a mere contract it does not require any great formality and the document cannot be considered as a particularly formal document at all, and oral evidence is admissible to prove existence of separate oral agreement as to any matter on which the document is silent and which is not inconsistent. (*Bennett and Smith, JJ.*) KESLA MAL NAND KISHORE *v.* COOPER ALLEN & CO., CAWNPORE. 165 I.C. 473=9 R.A. 282=1936 A.W.R. 1216=1936 All.L.R. 910=A.I.R. 1936 All. 717.

——S. 92, Proviso (2)—*Conveyance—Agreement that vendee gives up claim to money debts not specified in deed—Oral evidence to prove—Admissibility.*

The parties to a conveyance are not in view of the second proviso to S. 92, Evidence Act, prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance and the vendor cannot be prevented from attempting to prove that there was such an agreement. (*James and Rowland, JJ.*) RANBAHADUR SINGH *v.* AWADHBEHARI PRASAD SINGH. 18 Pat. 318=11 R.P. 575=181 I.C. 184=5 B.R. 537=21 Pat.L.T. 138=A.I.R. 1939 Pat. 411.

——S. 92, Proviso (2)—*Document containing only some terms of tenancy—Evidence of separate oral agreement containing other terms—Admissibility.*

Where a document contains only some of the terms of a contract of tenancy, evidence of a separate oral agreement containing other terms which were not reduced to writing can be given under Proviso (2) to S. 92. (*Khundkar, J.*) CHAMPARAN JAIN *v.* SRIPATHI NATH DEB. 177 I.C. 355=11 R.C. 235=A.I.R. 1938 Cal. 430.

——S. 92, Proviso (2)—Interest—Agreement as to—Oral evidence—Admissibility. *See* NEGOTIABLE INSTRUMENTS ACT, S. 87 AND EVIDENCE ACT, S. 92, PROV. (2). 1939 A.W.R. (H.C.) 79.

——S. 92, Proviso (2)—*Scope—Mortgage deed—Oral agreement by mortgagee to accept conveyance in satisfaction of mortgage—Admissibility.*

A separate oral agreement on a distinct and collateral matter, although a part of the same transaction, would come within proviso (2) of S. 92 of the Evidence Act, if the original instrument is silent on the point which is the subject-matter of the agreement. Accordingly evidence relating to an oral agreement by the mortgagee to accept a conveyance in satisfaction of the mortgage, although such agreement has relation to the mortgage transaction, is admissible in evidence under proviso (2) of S. 92, if the mortgage deed is silent as to the mode of payment of the mortgage debt. A clause in the deed providing for payment of the mortgage money within a certain date and for payment of interest after the said date, if the money be not paid within the specified date, does not deal either with the mode of payment or satisfaction of the debt due under the bond. (*Guha and Mitter, JJ.*) KUNJA BEHARI DAS *v.* RAMAN BEHARI DAS. I.L.R. (1937) 2 Cal. 752=174 I.C. 108=10 R.C. 636=41 C.W.N. 1053=A.I.R. 1937 Cal. 619.

——S. 92, Proviso (3)—*"Condition precedent"—Meaning of—Mortgage deed—Agreement to take over outstandings and to pay amount and*

interest within a fixed time—Oral evidence to prove that agreement was only to pay amounts as and when collected—Admissibility—If condition precedent to attaching of obligation.

The condition precedent to which S. 92, proviso (3) of the Evidence Act refers is a condition the subject-matter of which is *de hors* the contents of the instrument, and if effect be given to the condition it cannot affect the terms of the document itself. Where at a partition between the plaintiff and the defendant certain outstandings are allotted to the plaintiff and the defendant agrees to take over the bonds under which the outstandings are due and to pay a certain sum to the plaintiff within a fixed time and in the meanwhile to pay plaintiff interest on the amount at a certain rate, and the agreement is reduced to writing in a mortgage-deed executed by the defendant as security for repayment of the said amount, it is not open to the defendant in a suit on the mortgage deed to adduce oral evidence to prove that the arrangement was not as stated in the mortgage deed, but was merely to the effect that the defendant should pay plaintiff sums as and when collected. The effect of permitting oral evidence in such case will be to run counter to the principle underlying S. 92, proviso (3), and to directly contradict the terms of the document. The arrangement set up cannot be regarded as one by way of a condition precedent to the attaching of the obligation under the mortgage as contemplated by proviso (3) of S. 92. (*Venkataramana Rao, J.*) PAPI REDDY *v.* NARAYANA REDDY. 165 I.C. 669=9 R.M. 291=1936 M.W.N. 994=44 L.W. 629=A.I.R. 1936 Mad. 841=71 M.L.J. 522.

——S. 92, Proviso (3)—*Condition precedent—Mortgage—Purchase of properties subject to—Agreement by mortgagee to purchaser to accept payments piecemeal and to execute release deed whenever desired—Suit for specific performance—Plea that release was to be executed only after whole amount has been paid—Oral evidence to prove—Admissibility.*

Plaintiff who purchased certain properties in Court auction subject to a mortgage in the defendant's favour agreed with third parties to sell some of them with the knowledge and consent of the defendant who agreed to accept piecemeal payments from the plaintiff and to release the lands which plaintiff agreed to sell to the third parties. The agreement provided, *inter alia*: "I shall execute at your cost a deed of relinquishment of right in your favour whenever desired by you and get the same registered..... Therefore I shall whenever desired by you and at your cost execute in the same manner a deed of relinquishment of right in your favour, even in respect of those lands mentioned in that document and get it registered." Plaintiff having sued for specific performance of the agreement, the defendant pleaded an oral agreement that the release deed was only to be given when the entire mortgage debt had been discharged, and that he was bound to give it if called upon by the plaintiffs after such discharge and not before.

Held, that the arrangement set up by the defendant was not "a condition precedent to the attaching of any obligation" within the meaning of S. 92, proviso (3) of the Evidence Act, and hence the oral arrangement could not be admitted in evidence. (*Beasley, C.J. and Gentle, J.*) RAMI REDDI *v.* PATTABHIRAMI REDDI. 169 I.C. 12=9 R.M. 718=1936 M.W.N. 1238=44 L.W. 749=A.I.R. 1937 Mad. 124=71 M.L.J. 599.

——S. 92, Proviso (3)—*Construction and scope—Promissory note—Suit on—Plea that note was agreed not to be sued on, but that it should be adjusted in taking accounts of partnership alleged to consist of plaintiff and defendants—Oral evidence to prove—Admissibility.*

Proviso 3 to S. 92 of the Evidence Act clearly presupposes that in a case to which it could be applied the contract, grant or disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder. In a suit on a promissory note, the defendants (executants) pleaded that it was agreed at the time when the note was executed that it was not to be enforced, but that the amount thereof was to be adjusted in the making up of the accounts of a firm in which they alleged that the plaintiff was partner, and that the taking up of the partnership accounts was a condition precedent to the attaching of any liability to them on the promissory note. They contended that under S. 93, proviso 3, they were entitled to adduce evidence to show the same.

Held, that the facts pleaded did not aim at proving a condition precedent to the attaching of the legal liability to the instrument, but laid the axe at the very foundation of it nullifying entirely the effect of the promissory note and its existence, and that the language of S. 92, proviso (3) could not bear such strain. (*Wadia and Indarnarayan, JJ.*) CHHAGANLAL KALYANDAS *v.* JAGJIWANDAS. 187 I.C. 41=12 R.B. 391=41 Bom.L.R. 1263=A.I.R. 1940 Bom. 54.

——S. 92, Proviso (3)—*Promissory note payable on demand—Collateral oral agreement not to make demand until certain condition is fulfilled—Admissibility.*

It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument for an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract. Where the promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of Proviso (3) of S. 92. (*Lord Wright.*) ROWLAND ADY *v.* ADMINISTRATOR-GENERAL OF BURMA. 1938 Rang.L.R. 417=175 I.C. 449=48 L.W. 40=1938 O.L.R. 312=11 R.P.C. 23=1938 M.W.N. 769=1938 O.W.N. 731=1938 A.L.R. 525=4 B.R. 719=40 Bom.L.R. 1075=32 S.L.R. 810=19 Pat L.T. 749=A.I.R. 1938 P.C. 198=(1938) 2 M.L.J. 469 (P.C.).

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——S. 92, Proviso (3)—*Scope—"Condition precedent"—What is—Promissory note payable on demand—Indorsee's suit against maker and indorser—Plea by former of oral agreement between him and indorser that plaintiff was to look to endorser only—Evidence to prove—Admissibility.*

S. 92 of the Evidence Act precludes proof of a contemporaneous oral agreement showing that a party to a promissory note is not bound according to the tenor of the promissory note. Oral evidence is not admissible for the purpose of proving a contemporaneous oral agreement which not merely suspends the operation of the promissory note but destroys it altogether. An agreement in defeasance of the contract must be distinguished from an agreement suspending the coming into force of the contract embodied in the promissory note. If the oral agreement is merely to suspend the coming into force of n obligation under a promissory note, where the oral agreement is that no demand will be made on the promissory note payable on demand until a specified condition is fulfilled that is a condition precedent, oral evidence of which is permissible under proviso (3) to S. 92 of the Evidence Act. But a collateral agreement, the effect of which is to destroy the promissory note itself is within the proviso. In a suit on a promissory note payable on demand, instituted by the indorsee thereof against the maker and the endorser (original payee), the maker set up an oral agreement between himself and the original payee, of which the plaintiff (endorsee)had knowledge, that the maker was not to be made liable under the note but that the plaintiff was to look only to his indorser, and that so far as he the maker was concerned, the promissory note was not binding on him.

Held, that evidence of the oral agreement was not admissible under S. 92 of the Evidence Act. (*Davis, J. C. and Weston, J.*) TYABI TRADING CO., LTD. *v.* GHULAMALI. I.L.R. (1939) Kar. 523 =184 I.C. 867=12 R.S. 136=A.I.R. 1939 Sind 299.

——S 92,Proviso (3)—*Scope—Promissory note—Suit on—Plea that note was only receipt and not intended to be an obligation—Oral evidence to prove—Admissibility.*

In a suit on a promissory note, an agreement suspending the coming into force of the contract contained in the promissory note, constituting as it does a condition precedent within the meaning of proviso 3 to S. 92 of the Evidence Act, may be proved. Where the defendant in the suit pleads that the note executed by him which is sued on was only a receipt for the earnest money for a contract of purchase by the plaintiff, that the purpose of the receipt of money has been wrongly stated in the promissory note, and that it was not intended to attach any obligation to the instrument as such, he is entitled to adduce oral evidence in support of such plea. S. 92 does not bar oral evidence to prove the same. (*Dhavle, J.*) UMRAO SINGH *v.* RAUNAK SINGH. 5 B.R. 548=181 I.C. 280=11 R.P. 586=20 P.L.T. 514=1939 P. W.N. 200=A.I.R. 1939 Pat. 495.

——S. 92, Proviso (4)—*Mortgage—Registered mortgage—Oral agreement in discharge of mortgage—Admissibility.*

S. 92, proviso (4) prohibits the admissibility of a subsequent oral agreement to rescind or modify

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any contract, grant, or disposition of property which is by law required to be in writing or which has been registered according to the law in force for the time being as to the registration of documents, but it does not preclude the admissibility of any transaction or contract in satisfaction or discharge of the obligation arising thereunder. Subsequent to a registered mortgage, the parties entered into a contract by which the property was to be put in possession of the mortg gee for five years and the mortgage-debt was deemed to be discharged.

Held, that the contract to let and the letting into possession for five years operated as a discharge of the obligation and in no way offended the proviso to S. 92 and evidence of such an agreement could be given. The agreement to take and taking possession of the land for a period of five years were deemed by the parties as fulfilment of the obligation under the bond and not in any way altering the terms of the bond; 42 Mad. 41 (F.B.). Dist. (Case-law reviewed.) (*Venkataramana Rao, J.*) LAKSHMINARASIMHA RAO *v.* RAGHAVAMMA. 162 I.C. 53 (2)=8 R.M. 933=1936 M.W N. 205=A.I.R. 1936 Mad. 380.

——S. 92, Proviso (4)—*Mortgage deed—Oral agreement varying terms of deed as to payment—Admissibility.*

Though it is always open to a mortgagor to prove that on a certain day he paid the sum due uuder the mortgage, still when in the registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. (*Harries, C. J. and Fazl Ali, J.*) KHUB LAL *v.* BECHAN MANDAL. 187 I. C. 63=12 R.P. 563=6 B.R. 422=21 P.L.T. 437 =A.I.R. 1940 Pat. 49.

——S. 92, Proviso (4)—*Promissory note—Distinct subsequent oral agreement rescinding or modifying—Oral evidence—Admissibility.*

A promissory note is a document which is required to be in writing, and, therefore, S. 92, Evidence Act, applies to it and Proviso 4 shows that if any distinct subsequent oral agreement is sought to be proved, which would have the effect of rescinding or modifying any such contract, then it must be in writing. Oral evidence to prove that the plaintiff agreed to discharge or did discharge the defendant from his obligation under the pronote is inadmissible under S. 92, Proviso 4. (*Spargo, J.*) MUTHURAMAN CHETTYAR *v.* VENKATA REDDY. 174 I.C. 964=10 R.R. 455=A.I.R. 1937 Rang. 521.

——S. 92, Proviso (4)—*Promissory note—Subsequent agreement giving up personal liability and accepting mortgage by one executant to another—Oral evidence to prove—Admissibility.*

In a suit on a promissory note executed by defendants 1 and 2 agreeing to repay the amount with interest after ninety days on demand, the defendants pleaded that money under the note had been paid to the second defendant, that the first defendant was only a surety for him, and that at a later date, a new arrangement had been made between the parties, under which a mortgage bond for the amount executed by the second defendant in favour of the first defendant *benam*

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for the plaintiff fixing a period of three years was accepted by the plaintiff in place of the promissory note and that the plaintiff gave up his right to proceed against the defendant personally.

Held, that S. 92 (4) did not apply and that oral evidence to prove the new arrangement could not be legally admitted in evidence. (*Reilly, C.J. and Shankaranarayana Rao, J.*) KHADER KHAN *v.* CHINNA SWAMIAH. **14 Mys.L.J. 137.**

——S. 92, Proviso (4)—*Registered lease—Oral agreement to release lessee from liability under covenants in lease—Admissibility.*

Per *Blackwell, J.*—Proviso (4) to S. 92 of the Evidence Act is a bar to the proof of an oral agreement by the lessor to release the lessee from his liabilities under the personal covenants contained in a registered lease. (*Beaumont, C.J. and Blackwell, J.*) ABDUL RAHMAN *v.* SIR PHIROZE CURSETJI SETHNA. **60 Bom. 394=161 I.C. 57=8 R.B. 302=38 Bom.L.R. 34=A.I.R. 1936 Bom. 88.**

——S. 92,Proviso (4)—*Registered lease sought to be varied by later unregistered agreement—Effect.*

A registered lease cannot be varied by a later unregistered agreement and the effect is to leave standing the registered lease without any conditions. (*Nanavutty and Smith, JJ.*) JANKA KUER *v.* ANANT SINGH. **168 I.C. 263=9 R.O. 457=1937 O.L.R. 241=1937 R.D. 244 (2)=1937 O. W.N. 477=A.I.R. 1937 Oudh 341.**

——S. 92, Proviso 6—*Applicability—Document executed by agriculturist as sale—Evidence to prove that deed was mortgage and not sale—Admissibility.*

S. 92, Proviso (6), does not apply to a case where a document is clear and unambiguous in its terms. Where a document executed by an agriculturist is on the face of it a sale deed but is alleged to be only an ostensible deed of sale being in reality a mortgage, and in a suit by the executant for redemption of the mortgage he pleads a contemporaneous oral agreement to reconvey, but it is proved that the executant is not an agriculturist, the beneficent provisions of S.10, Deccan Agriculturists' Relief Act, cannot be taken advantage of, so that even assuming the case of the executant to be true, so far as parties to the transaction are concerned, he cannot bring either direct or circumstantial evidence to show that the document was intended to operate as a mortgage and not as a sale-deed. He can, however, show as against persons who are neither parties to the transaction nor are representatives in interest of any such parties that the deed purports to be a mortgage and not a sale. (*Davis, J.C. and Weston, J.*) MILKIMAL *v.* TOTOMAL. **I. L.R. (1939) Kar. 530=184 I.C. 677=12 R.S. 128=A.I.R. 1939 Sind 200.**

——S. 92, Proviso (6)—*Evidence of conduct—Admissibility.*

Where the terms of a written contract are perfectly clear the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract in accordance therewith does not arise. (*Almond, J.C. and Soofi, J.*) HAJI KHAN GUL KHAN *v.* CHOTHU RAM. **184 I.C. 585 (2)=12 R. Pesh. 29=A.I.R. 1939 Pesh. 41.**

——S. 92, Proviso (6)—*Oral evidence to explain document—Admissibility.*

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Evidence is certainly admissible to explain in what manner the language used is related to existing facts; but that is only if such relation does not appear from the document itself. In a case where there is no such ambiguity which needs explanation and the terms of the document are quite clear, evidence to explain the terms of the deed should be disallowed. 22 A. 149, 27 I.A. 58 (P.C.), Rel. on. (*Jai Lal, J.*) BASANTI DEVI *v.* OFFICIAL RECEIVER. **164 I.C. 463=9 R.L. 130 (2)=A.I.R. 1936 Lah. 508.**

——S. 93—*Ambiguity in deed—When entitles Court to consider questions of fact.*

The mere fact there is ambiguity or difficulty not being a latent ambiguity, will not entitle the Judge to consider questions of fact to assist him in construing a deed. But if there is no expression in the document itself which, properly construed, will entitle the Court to come to any conclusion with regard to the matter, then the questions of fact are certainly open to him to consider in coming to a conclusion with regard to the matter. (*Wort and Rowland, JJ.*) DARBAR SAHEB *v.* BARE LAL KANDARP NATH SAH DEO. **162 I.C. 797=8 R.P. 567=17 Pat.L.T. 488=A.I.R. 1936 Pat. 275.**

——S. 93—*Scope—Oral evidence to show that two different deeds are one and same transaction—Admissibility.*

Where two deeds on their face appear to be separate transactions, another agreement which was not evidenced by any writing cannot be proved to show that the deeds though apparently two separate transactions, were agreed to be treated as one. (*Wort and Varma, JJ.*) DEONANDAN TEWARY *v.* DRAUPADI KUER. **175 I.C. 831=4 B. R. 632=11 R.P. 19=A.I.R. 1938 Pat. 242.**

——S. 94—Applicability—Principle underlying—Application to amend mortgage deed, preliminary and final decrees. *See* C. P. CODE, SS. 151, 152 AND 153. **1939 A W.R. (H C.) 173.**

—— S. 94—*Applicability—Sale-deed — Mutual mistake of parties—Oral evidence—Admissibility.*

Where in the case of a sale-deed it is not the seller alone who is trying to get out of the bargain but the seller and the purchaser both agree that the intention was to enter into the deed land bearing different khasra numbers, and that the mistake was mutual, it is open to the parties to produce evidence to show what was intended to be sold and purchased. S. 94 of the Evidence Act is not applicable in such circumstances. (*Abdul Rashid, J.*) ARYA *v.* DAUNDI. **188 I.C. 813=13 R.L. 40=42 P.L.R. 222=A.I.R. 1940 Lah. 236.**

——Ss. 101 and 102—*Allegation that transfer is in violation of S. 12 of C. P. Tenancy Act—Burden of proof.*

It is on the person who asserts that a transfer is in contravention of S. 12 of the C. P. Tenancy Act that the burden of proving it lies, for it is his application that would fail, if no evidence at all were given. (*A.L. Binney, F.C.*) MANIKRAO *v.* RAMCHANDRA. **1938 N.L.J. 474.**

——S. 101—*Bond—Recital as to consideration—Burden of proving that recital is untrue.*

Where a mortgage bond contains a recital that the consideration had been received by the executant, the burden lies upon the executant or his representative to prove that the recital was

untrue and to satisfy the Court how he became a party to a document which contained an untrue recital. (*Ranjitmal, J.*) BAIJDAN *v.* SHIV BUX. 1939 M.L.R. 86 (Civ.).

——S. 101—*Burden of proof—Duty of party to produce best evidence.*

Where in a suit for money lent, the plaintiff admitted that he kept a day book but the same was not produced.

Held, that the plaintiff on whom lay the onus of proof should produce the best evidence available and in case such evidence was not produced he must suffer the consequences. (*Kichlu, J.*) KASHMIROO *v.* MT. ACHHRI. 41 P.L.R. J. & K. 21.

——S. 101—*Burden of proof—Objection as to wrong allocation—If can be allowed in appeal.*

Where a person accepts the burden of proof and undertakes to discharge it, he cannot be allowed to turn round and say that he has been wrongly treated in the matter of burden of proof. (*Ranjitmal and Sukhdeonarain, JJ.*) BALKISHAN *v.* MT. JAWRI. 1939 M.L.R. 244 (Civ.).

——Ss. 101 and 102—*Cause of action arising out of Marwar—Defendant objecting to jurisdiction of Marwar Courts—Onus of proving their jurisdiction.*

Where the cause of action arose in British India and summons to the defendant was also served in British India and the defendant objected to the jurisdiction of the Marwar Courts, *held* that the burden of proving that Marwar Courts had jurisdiction to entertain the suit lay upon the plaintiff. (*Ranjitmal, J.*) JUWARMAL *v.* DOLICHAND. 1939 M.L.R. 149 (Civ.).

——S. 101—*Consideration—Recital of payment in bond—Third party denying consideration—Onus of proving payment.*

Though as between parties to a document the admission or proof of execution would shift the onus on to the party denying consideration, yet a person who is not a party to the document in question cannot be held liable unless there is evidence to prove that the money was actually paid. (*Nawal Kishore, C.J.*) ANOPSINGH *v.* LALSINGH. 1939 M.L.R. 118 (Civ.).

——S. 101—*Evidence given by both parties—Rights of party on whom onus lies.*

A party on whom the onus lies may take advantage not only of the evidence adduced by him or on his behalf, but also of any fact or circumstance in his favour appearing in the evidence adduced by or on behalf of the other party. But where the entire evidence on both the sides has been brought before the Court the party on whom the onus primarily rests but who has failed to adduce evidence sufficient to discharge the onus is not entitled to augment his case by the mere weakness of the evidence adduced by the adverse party, although nothing transpires in such evidence which lends support to the case he wants to make out. (*Mya Bu, Offg. C.J. and Sen, J.*) U BA SAING *v.* LAKSHMANAN CHETTIAR. 162 I.C. 247=8 R.R. 551=A.I.R. 1936 Rang. 170.

——S. 101—*Onus immaterial—Both sides entering into evidence.*

The question of onus of proof is of no great importance, if both sides have entered into evidence. (*Jayakar, J.*) NAND KISHWAR BUX *v.* GOPAL BUX. 188 I.C. 1=12 R.P.C. 187=6 B.R. 636=21 P.L.T. 519=52 L.W. 57=1940 O.L.R. 331=1940 P.W.N. 572=1940 O.A. 558=1940 A.W.R. (P.C.) 101=1940 M.W.N. 922=A.I.R. 1940 P.C. 93 (P.C.).

——S. 101—*Onus immaterial—Entire evidence led by parties.*

In a case where the parties have led all the evidence, the question of onus of proof is of no importance. (*Dalip Singh, J.*) MD. YUSAF ALI *v.* D. C. HOSHIARPUR. A.I.R. 1940 Lah. 336.

——S. 101—*Onus immaterial—Evidence produced by both parties.*

In a case even where there is a wrong allocation of onus, if both parties have led evidence bearing on the point and the Court has carefully considered it, the question of onus will be of no particular importance. (*Tek Chand, J.*) SANDHURA SINGH *v.* KEHR SINGH. 169 I.C. 228=9 R.L. 725 =39 P.L.R. 396=A.I.R. 1936 Lah. 1016.

——S. 101—*Onus immaterial—Facts proved by ample evidence.*

In a case where all the facts are proved by ample evidence and the Court is in a position exactly to say what happened, no importance need be attached to the rule as regards burden of proof. It is only in cases where evidence is meagre and the Court is not in a position definitely to know what happened that the technical rule as to burden of proof is to be observed. (*Ranjitmal and Sukhdeonarain, JJ.*) BALKISHAN *v.* MST. JAWRI. 1939 M.L.R. 244 (Civ.).

——S. 101—*Person not in possession of property—Proof of title—Onus.*

If a person is not in possession of a property, the onus of showing a good title to it is on him. (*Monroe, J.*) BABU *v.* DALIP SINGH. 42 P.L.R. 294=A.I.R. 1940 Lah. 311.

——S. 101—*Suit against mortgagor's heir—Defendant denying execution—Execution proved—Passing of consideration—Presumption.*

In a suit against heir of a mortgagor who denies knowledge of the transaction, the plaintiff should be deemed to have made out a *pr ma facie* case as to the passing of the consideration also, if he proves execution and exhibits the documents containing recital as to the receipt of the consideration by the mortgagor whose heir the defendant is. (*Ranjitmal, J.*) BAIJDAN *v.* SHIV BUX. 1939 M.L.R. 86 (Civ).

——S. 102—*Construction — Party on whom burden lies not discharging it—Effect.*

S. 102 means that when the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence. (*Agarwala and Rowland, JJ.*) RADHA MOHAN MISSIR *v.* KAMALDHARI MISSIR. 162 I.C. 21=8 R.P. 505 =A.I.R. 1936 Pat. 243.

——Ss. 102 and 106—*Mortgagor alleging mortgage void as mortgagee was not member of agricultural tribe—Allegation contrary to entry in mortgage-bond—Burden of proof.*

In a suit for possession of land, the mortgagor alleged that the mortgage was void as the mortgagor was a Jat, a member of an agricultural tribe and the mortgagee, though described in the mortgage-deed as a Rajput, was really *kumhar* and therefore not a member of an agricultural tribe and that, there the mortgage offended against the provisions of the Punjab Alienation of Land Act.

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Held, that if neither party called any evidence it was the plaintiff who would lose the case and that, therefore, the initial burden was on him to prove that the mortgagee was not a Rajput as described in the mortgage-deed. (*Jai Lal, J.*) SHIB NARAIN SINGH *v.* BADHAWA SINGH. 38 P. L.R. 427.

——S. 102—*Suit on bond—Factum and legality of consideration—Burden of proof.*

In a suit to recover the amount of a bond executed by the defendant, the burden of proof is on the defendant to show that there was no consideration for the bond or that the debt was a gambling debt. (*Monroe, J.*) NAWAB DIN *v.* DHANPAT RAM. 39 P.L.R. 42.

——S. 103—*Bond—Consideration different from that recited—Onus of proving full consideration.*

Where it is established that the consideration for the bond is different from that recited in the bond, the onus shifts on the plaintiff to prove affirmatively that the bond was executed by the defendant for the full consideration. (*Nawal Kishore, C.J.*) ABDUL GAFOOR *v.* PARSRAM. 1939 M.L.R. 12 (C.).

——Ss. 105 and 101—*Burden of proof—Meaning of—Criminal trial—Accused pleading circumstances bringing case within Exceptions—Court on review of evidence left in doubt as to existence of such circumstances—Accused, if should be convicted.*

Per *Dunkley, J.*—The phrase "burden of proof" is used in two distinct meanings in the Indian Evidence Act, *viz.*, the burden of establishing a case and the burden of introducing evidence. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. This principle is enacted in S. 101 of the Evidence Act, and in this section the term "burden of proof" is used in the first of its meanings, namely, the burden of establishing a case. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by provisions of S. 105 and its closely allied section S. 106. In S. 105 the phrase "burden of proof" is clearly used in its second sense, namely, the duty of introducing evidence. The duty of the accused under S. 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception in the Penal Code, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt. The conclusion, therefore, is that if the Court either is satisfied from the examination of the accused and the evidence adduced by him or from circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded by the accused has been proved, or upon a review of all the evidence is left in reasonable doubt whether such circumstances do exist or not the accused, in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of the minor offence.

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Per *Goodman Roberts, C. J.*—The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. 14 Rang. 666=168 I.C. 193=9 R.R. 340=38 Cr.L.J. 524=A.I.R. 1937 Rang. 83 (F.B.).

——S. 105—*Criminal trial—Burden af proof—When shifts on accused.*

In a criminal trial the burden of proof is always on the prosecution, and it is only when a good *prima facie* case has been made out against the accused sufficient to justify his conviction of that offence, that the burden shifts upon the accused to prove that he is not guilty of any such offence. (*Nanavutty and Zia-ul-Hasan, JJ.*) NANNHUN *v.* EMPEROR. 165 I.C. 458=37 Cr.L.J. 1130=9 R.O. 213=1936 O.L.R. 650=1936 O.W.N. 1013.

——S. 105—*Interpretation—Decision in* Woolmington *v.* Director of Public Prosecutions—*If a guide.*

The decision of the House of Lords in *Woolmington* v. *Director of Public Prosecutions*, (1935 A.C. 462) is in no way inconsistent with the law in British India. Indeed the principles there laid down form a valuable guide to the correct interpretation of S. 105 of the Evidence Act. (*Roberts, C. J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. 14 Rang. 666=9 R.R. 340=38 Cr.L.J. 524=168 I.C. 193=A.I.R. 1937 Rang. 83 (F.B.).

——S. 105—*Presumption under—Scope—Accused denying* in toto *acts alleged—Circumstances bringing case within exception appearing in evidence for prosecution—Accused, if entitled to be acquitted.*

Per *Dunkley, J.*—Even though the accused denies *in toto* the act or acts alleged, where it appears from the evidence for the prosecution that there are reasonable grounds for holding that the case falls within an exception, the presumption enacted in the last line of S. 105 of the Evidence Act does not arise at all. The burden is on the prosecution to establish guilt of the accused beyond reasonable doubt, and if upon a review of all the materials on the record there appears a reasonable doubt as to whether the case falls within any exception, the prosecution has failed to discharge that burden, and the accused must be acquitted or convicted only of the minor offence, as the case may be. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. 14 Rang. 666=9 R.R. 340=38 Cr.L.J. 524=168 I.C. 193=A.I.R. 1937 Rang. 83 (F.B.).

——S. 105—*Scope—Prosecution not proving case—Accused not proving exception pleaded—Right to acquittal.*

Even in a case to which S. 105 applies, an accused may rely upon an exception in his defence and fail to prove it, and yet be entitled to an acquit-

tal, for the prosecution may have failed to prove all the necessary elements in the offence of which the accused has been charged, or the accused may by his statement, read with the other evidence on record, have raised a reasonable doubt in the mind of the Court and so have entitled himself to an acquittal. (*Davis, J.C. and Lobo, J.*) SHEWARAM *v* EMPEROR. I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.

——S. 105—*Scope and effect of—Article hired by person and in his exclusive possession—Damage to—Plea of ordinary wear and tear—Onus.*

Where an instrument hired by a person was for all practical purposes in his exclusive possession, it is for him to explain how it came to be damaged. It is for him to establish that it was a case of ordinary wear and tear and not of carelessness or negligence in any degree. (*Lobo, J.*) BACHRAJ FACTORIES, LTD. *v.* BOMBAY TELEPHONE CO., LTD. 184 I.C. 36=12 R.S. 83=A.I.R. 1939 Sind 245.

——S. 106—Applicability—Bailment—Hire of elephant for term of one year—Death of elephant before expiry of period of hire—Claim to damages—Negligence of bailee—Burden of proof. *See* CONTRACT ACT, S. 161. 45 L.W. 158.

——S. 106—Applicability— Trade-mark—Suit for infringement—Knowledge of plaintiff's right in design and of user by defendant with such knowledge—Burden of proof. *See* PATENTS AND DESIGNS ACT, S. 53 (1) (*b*). 40 C.W.N. 938.

——S. 106—*Criminal trial—Burden of proof.*

Per *Goodman Roberts, C. J.*—The burden of proof referred to in S. 106 of the Evidence Act is that of introducing evidence merely. This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain he ought therefore to be found guilty. (*Roberts, C.J., Leach and Dunkley, JJ.*) EMPEROR *v.* U. DAMAPALA. 14 Rang. 666=9 R. R. 340=38 Cr.L.J. 524=168 I.C. 193=A.I.R. 1937 Rang. 83 (F.B.).

——S. 106—*Failure to go into witness-box—Presumption—Party being a pardanashin, if a good excuse for the failure.*

A party's failure to go into the witness box raises a strong presumption against the truth of his or her case. The fact of a party being a pardanashin lady is not a sufficient cause for not getting into the box in as much as she could get herself examined on commission. (*Hamilton, J.*) SHUBRATAN *v.* SHABBIR ALI. 187 I.C. 317=12 R.O. 369=1940 O.W.N. 375=1940 O.A. 337=1940 A.W.R. (C.C.) 175=1940 O.L.R. 197=A.I.R. 1940 Oudh 266.

——S. 106—*Question whether plaintiff is authorized to represent institution in suit—Proof of the minutes of the meeting of Managing Committee—If sufficient to discharge burden.*

Where the question is whether plaintiff is authorized by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due

authority is available, it is sufficient to discharge any burden on the plaintiff under S. 106. (*Lord Thankerton.*) SUNDER SINGH *v.* SUNDER SINGH. 65 I.A. 106=I.L.R.(1938)Lah. 63=32 S.L.R. 350=172 I.C. 993=47 L.W. 239=1938 A.L.J. 194=1938 O.W.N. 245=1938 O.L.R. 104=1938 A.L.R. 138=1938 A.W.R. (P.C.) 74=40 P.L.R. 247=4 B.R. 317=66 C.L.J. 524=10 R.P.C. 202=1938 O.A. 371=42 C.W.N. 930=1938 M.W.N. 621=1938 P.W.N. 548=40 Bom.L.R. 724=A.I.R. 1938 P.C. 73=(1938) 1 M.L.J. 359.

——S. 106—*Scope—Accused—If liable to discharge—Burden of proving innocence.*

S. 106 was never intended to be used to place upon the accused the burden of proving their innocence. S. 106 is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution, but on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. S. 106 does not enable the Judge to say to the jury that the accused must explain this and that he must satisfy him on this point or that or be found guilty. (*Davis, J.C, and Lobo, J.*) SHEWARAM *v.* EMPEROR. I.L.R. (1940) Kar. 249=184 I.C. 474=12 R.S. 107=41 Cr.L.J. 28=A.I.R. 1939 Sind 209.

——S. 106—*Scope and applicability.*

Per *Niamatullah, J.*—S. 106 of the Evidence Act contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else, and has no application to cases, where the fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others—if they happened to be present when it took place. It cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused.

Per *Allsop, J.*—S. 105 obviously refers to cases where the defence of the accused depends on his proving a certain fact, that is, cases where his guilt is established on the evidence produced by the prosecution unless he is able to prove some other facts especially within his knowledge which would render the evidence for the prosecution nugatory. (*Niamatullah and Allsop, JJ.*) RAM BHAROSEY *v.* EMPEROR. 166 I.C. 430=9 R.A. 406 (2)=38 Cr.L.J. 205=1937 All. L.R. 85=1936 A.W.R. 927=1936 A.Cr.C. 202=1936 A.L.J. 1124=1936 Cr.C. 1100=A.I.R. 1936 All. 833.

——S. 106—Scope and effect—Charge of murder of wife against husband—Accused having special means of knowledge as to whether crime has been committed—If absolves prosecution from proving fact of commission of crime. *See* CRIMINAL TRIAL—BURDEN OF PROOF. 1939 M.W.N. 883.

——S. 106—Special knowledge—Fact of marriage—Option of puberty—Onus. *See* MAHOMEDAN LAW—MARRIAGE OPTION OF PUBERTY. 1939 A.W.R. (H.C.) 811.

——S. 108—*Date of death—Presumption as to.*

There is no presumption under S. 108, Evidence Act, that a person who has not been heard of for a period of more than seven years died at the end of the first seven years or at any particular date. (*Barlee and Macklin, JJ.*) VITHABAI *v.* MALHAR. I.L.R. (1938) Bom. 155=175 I.C. 190

EVIDENCE ACT (1872), S. 108.

=10 R.B. 524=40 Bom.L.R. 147=A.I.R. 1938 Bom. 228.

——S. 108—*Presumption under—Scope of.*

When the Court has to determine the date of the death of a person who has not been heard of for a period of not less than seven years, there is no presumption under S. 108 of the Evidence Act that he died at the end of the first seven years, or at any particular date. It is the duty of the person who asserts death to prove the date of death. 5 Pat. 312 (P.C.), Rel. on. (*Addison and Abdul Rashid, JJ.*) ILAHI BAKHSH *v.* THE SECRETARY OF STATE FOR INDIA. 165 I.C. 586=9 R.L. 264=38 P.L.R. 1126.

——S. 109—*Tenant admitting tenancy—Presumption of its continuance.*

Where a tenant at will admits the tenancy, S. 109 comes into operation and there is a presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist. (*Mehta and Lobo, JJ.*) DAYARAM PARSUMAL *v.* SIRUMAL MANGHANMAL. 173 I.C. 222=10 R.S. 199=A.I.R. 1938 Sind 16.

——S. 110—*Applicability—Madras Land Encroachment Act—Case under — Presumption of title—Value of.*

S. 110, no doubt, enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions, must yield to proof. Where therefore title is proved or assumed, the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between S. 110, Evidence Act, and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But there is nothing to prevent long possession being relied upon as evidence of a grant made by the original owner. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. 181 I.C. 688=11 R.M. 832=1938 M.W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193=(1938) 2 M.L.J. 434.

——S. 110—*Onus under—When discharged.*

The onus laid on a party by S. 110 of the Evidence Act is discharged by his showing that the possession enjoyed by the other party rests on a basis inconsistent with a right of property. (*Lord Normand.*) THE DISTRICT LOCAL BOARD, AHMEDABAD *v.* SECRETARY OF STATE. 32 S.L.R. 340=1938 A.W.R. 115=10 R.P.C. 186=4 B.R. 295=172 I.C. 981=1938 O.A. 78=1938 O.L.R. 83=1938 O.W.N. 90=1938 All. L.R. 115=A.I.R. 1938 P.C. 87 (P.C.).

——S. 110—*Person taking possession under ostensible lawful title—Dispossession of by trespasser—Suit for possession—Onus.*

Where a person's original entry into possession had an ostensible lawful basis, and he is forcibly dispossessed by a person who is a trespasser, the person dispossessed can call in aid S. 110 and would be entitled to a decree for possession without being called upon to negative the defect in his title. (*James and Rowland, JJ.*) LILKU MAHTO *v.* AMAR MAHTO. 166 I.C. 305=9 R.P. 279=18 P.L.T. 63=1937 P.W.N. 10=3 B.R. 151 =A.I.R. 1936 Pat. 602.

EVIDENCE ACT (1872), S. 111.

——S. 110—"*Possession*" — *Meaning of—Suit for possession of house site in village—Plea by Government that it is a passage—Failure to prove —Plaintiff proved to have tethered cattle, stored grass and built* otli—*Effect of—If warrants inference of title—Burden of proof—If thrown on defendant.*

Possession to come within the scope of S. 110 of the Evidence Act must be possession founded on a *prima facie* right. It must be of such a character as leads to a presumption of title. Where the evidence on behalf of the plaintiff in a suit for possession of an open house site in a village shows that he has been using a large portion of the area in question for the purpose of tethering cattle and storing grass, and as regards one part of the site, that he has for a number of years had an *otli* thereon, and that he has erected hedges recently at certain places, that would not be sufficient to prove such legal possession by him as would justify an inference of his title. All this cannot establish anything beyond undisturbed user for some time. The mere fact that the defendant-Government fails to prove its allegation that the site in question is a passage or to contradict or refute the evidence led by the plaintiff as to his acts of user cannot strengthen the case of the plaintiff, which cannot be strengthened by any weakness in the defendant's case. The acts proved by the plaintiff are not sufficient to throw the burden of proof on the defendant-Government under S. 110. (*Broomfield and Sen, JJ.*) SURAJI FULAJI *v.* SECRETARY OF STATE. 169 I.C. 327=10 R.B. 14=39 Bom. L.R. 216=A.I.R. 1937 Bom. 193.

——S. 110—*Possession—Presumption of ownership.*

By virtue of S. 110 of the Evidence Act a person in possession is deemed to be owner until the contrary is shown. (*Skemp, J.*) PARIT SINGH *v.* AJUMAN IMDAD QAEZA. 41 P.L.R. 123.

——S. 110—*Possession—Value of—Inference of ownership—Burden of proof.*

Possession of property is presumptive proof of ownership, and under S. 110 of the Evidence Act, the burden of proving that the person in possession is not the owner is on the person affirming that he is not the owner. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. 17 Mys.L.J. 510.

——S. 111—*Applicability*—Bona fides—*Of a transaction not disputed but only its nature.*

S. 111 has no application except as between parties to the transaction itself. It does not apply where the sole dispute on the pleadings is not one of the *bona fides* of any particular transaction, but is one as to the real nature of the transaction itself. When a question which is entirely outside one of good faith and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, it does not mean that the method of impugning it should be different or things to prove should in any way be varied. (*Roberts, C. J. and Braund, J.*) MA PHAW *v.* S. B. DUTT. 178 I.C. 772=11 R.R. 275=A.I.R. 1938 Rang. 412.

——S. 111—Mortgage transaction between solicitor and client—How Courts would view. *See*

EVIDENCE ACT (1872), S. 111.

LEGAL PRACTITIONER—RELATION WITH CLIENT. 1940 O.A. 910 (P.C.).

——S. 111—*Pleader and client—Mortgage in favour of pleader's son—Good faith—Burden of proof—Duty of pleader to preserve evidence.*

Where a pleader who was engaged by a judgment-debtor in an execution proceeding advances money to him to pay off the decretal amount and takes a mortgage on the judgment-debtor's property in favour of his son, thereby securing a long term and profitable investment for his money, in view of the fiduciary relation existing between the pleader and his client it is incumbent on those seeking to enforce the mortgage to prove the utmost good faith on the part of the pleader in persuading his client to execute the mortgage. As the pleader knows that the onus of supporting this transaction would rest upon him, he must preserve the evidence which would be required to support it, if he desires that it should be upheld. Pleaders who deal with their clients must take care not only that the transaction is fair, but that they are in a position to prove that it was fair. (*Smith and Nanavutty, JJ.*) RAJA MOHAN MANUCHA *v.* NISAR AHMAD KHAN. 12 Luck. 435 =9 R.O. 108=1936 O.W.N. 1033=164 I.C. 945 =1936 O L.R. 526=A.I.R. 1937 Oudh 87.

——S. 111—*Scope.*

S. 111 of the Evidence Act relates to transactions entered into by persons *between whom* there is fiduciary relationship. (*Srivastava, Ag. C. J. and Zia-ul-Hasan, J.*) MAHOMED ABDUR RAHMAN KHAN *v.* MAHOMED IBADUL GHANI KHAN. 165 I. C. 597=9 R O. 235 (2)=1936 O W N. 1106= 1936 O.L.R. 671=A.I.R. 1937 Oudh 56.

——S. 112—*Applicability—Maternity in dispute.*

S. 112 can have no application to a case where the maternity of a person is in dispute and not his paternity. (*Jayakar.*) NAND KISHWAR BUX *v.* GOPAL BUX. 188 I.C. 1=12 R.P.C. 187=6 B.R. 636=21 Pat.L.T. 519=52 L.W. 57=1940 O.L.R. 331=1940 P.W.N. 572=1940 O.A. 558=1940 A. W.R. (P.C.) 101=1940 M.W.N. 922=A.I.R. 1940 P.C. 93 (P.C.).

——S. 112—*Applicability and scope—Mahomedan husband—Statement that wife is leading improper life and that child in wife's womb was not his but procreated by some one else—If sufficient to rebut presumption of legitimacy—Divorce by husband and imprecation of wife's infidelity—Effect of.*

The terms of S. 112, Evidence Act, must be given their due effect, and any evidence to the effect that a wife has been leading an improper life, even if the Court should be prepared to accept it as true, will not rebut the presumption enacted in that section. A statement by the husband that a child in the womb of his wife was not his child and must have been procreated by somebody else is not entitled to any weight; nor does it amount to such proof, even assuming it to be true, as will displace the effect of S. 112. The fact that the parties are governed by the Mahomedan Law makes no difference, so far as the application or effect of the presumption under S. 112 is concerned. The fact that under that law there may be a divorce of a wife by the husband making oath accompanied by an imprecation as to his wife's fidelity, and that if he denies the parentage of the child with which the wife is then pergnant, it will be bastardised, cannot override the presumption enacted in S. 112. (*Varadachariar and Pandrang Row, JJ.*) MUHAMMAD SHERIFF BEG *v.* ABDUD HAIL BEG. 1937 M.W.N. 957.

EVIDENCE ACT (1872), S. 112.

——S. 112—*Divorce case—Proof of non-access—Evidence of either spouse—Admissibility.*

In a divorce case where the paternity of the infant is in question, neither husband nor wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock. *Russel* v. *Russel*, (1924) A. C. 687 and 163 I.C. 749, Rel. on. (*Jai Lal, J.*) CHAMARETTE *v.* MRS. CHAMARETTE. 172 I.C. 619=10 R.L. 352= 39 P.L.R. 262=A.I.R. 1937 Lah. 176.

——Ss. 112 and 32—*Illegitimacy—Proof—Statemen of deceased husband that child is not his—Sufficiency.*

A statement by a deceased person, merely containing an assertion that a child born to his wife during the continuance of a valid marriage between them is not his child is not sufficient under S. 112 to establish illegitimacy of the child, when it is not established that the husband had no access to his wife during the period in which the child could be begotten. (*Jai Lal, J.*) HIDAYAT ULLAH *v.* MOHAMMAD ALI. 174 I.C. 557=10 R. L. 571=A.I.R. 1937 Lah. 266.

——S. 112—Legitimacy—Presumption from marriage among Mahomedans. *See* MAHOMEDAN LAW—MARRIAGE. A.I.R. 1936 All. 528.

——S. 112—*Presumption under—Applicability—Mother not married at time of conception.*

The presumption under S. 112, Evidence Act, applies quite irrespective of the fact whether the mother was married or not at the time of the conception. (*Skemp, J.*) THANDI RAM *v.* JAGAN NATH. 174 I.C. 933=10 R L. 634=A.I.R. 1937 Lah. 784.

——S. 112—*Presumption under—When rebutted.*

A husband soon after his marriage left for another city and did not return for a month. On returning back he refused to go to the house of his wife and live with her. After more than 280 days from the date of the marriage and during the continuance of the marriage a child was born to his wife.

Held, that as he left his wife soon after the marriage, the child had it been his, would have been born within 280 days from marriage because it was not possible for a child to be born after 280 days of its mother's pregnancy. The child was actually born after 280 days from the marriage and therefore though the marriage of still subsisting the husband did not get access to his wife during the time when the child could have been begotten and consequently the presumption that the child was the child of the husband was rebutted. (*Ba U, J.*) MA THEIN *v.* MAUNG MYA KHIN. 168 I.C. 825=9 R.R. 368=38 Cr.L.J. 646 =A.I.R. 1937 Rang. 67.

——S. 112—*Requirements—When fulfilled.*

Where the legitimacy of a person is challenged in a suit, a mere finding to the effect that the husband, after the marriage remained outside for long periods, that on his return from one of these periods of absence, he found cause to be dissatisfied with the conduct of his wife and denied his paternity of the child born to her, is not sufficient to meet with the requirements of S. 112. In order to fulfil the requirements of S. 112, it is necessary to prove that during the period there was no

occasion for the wife to meet her husband. (*Jai Lal, J.*) HIDAYAT ULLAH *v.* MOHAMMAD ALI. 174 I.C. 557=10 R.L. 571=A.I.R. 1937 Lah. 266.

——S. 114—*Adoption ceremonies—Presumption—Person enjoying status of adopted son for nearly half a century.*

When a person has for nearly half a century enjoyed the status of an adopted son and has been treated as such all his life and at this distance of time it is not possible to get witnesses who were actually present at the time and could depose to the performance of the ceremony, in such circumstances in the absence of anything to indicate the contrary, it must be presumed that all the necessary ceremonies were duly and regularly performed at the time of his adoption. (*Tek Chand and Abdul Rashid, JJ.*) ROSHAN LAL *v.* SAMAR NATH. I.L.R. (1938) Lah. 173=175 I.C. 746=11 R.L. 9=A.I.R. 1937 Lah. 626.

——S. 114—*Applicability to criminal cases.*

S. 114 applies not only to civil but also to criminal cases. (*Davis, J.C. and Lobo, J.*) JAMNODAS *v.* EMPEROR. 187 I.C. 127=12 R.S. 223=41 Cr.L.J. 401 (2)=A.I.R. 1940 Sind 42.

——S. 114—*Defamation—Imputation of bad conduct towards step-daughter—Defence of truth—Step-daughter not examined—No presumption against plaintiff.*

Where the defamatory statement complained of refers to the conduct of the plaintiff towards his step-daughter and the defence is not that the statement was not made, but that it was made by some other person, and truth is also pleaded, no presumption can be drawn against the plaintiff for not examining his step-daughter; presumption if any must be against the defendant. (*Dunkley, J.*) MA SEIN TIN *v.* U KYAW MAUNG. 164 I.C. 385=9 R.R. 91=A.I.R. 1936 Rang. 332.

——S. 114—*Police Officer asked to remember certain date refusing to refresh memory—Adverse inference, if can be drawn.*

Where a Police Officer is asked to remember the date of an arrest and he refuses to refresh his memory, an adverse inference may be drawn against him by the Court. (*Dalip Singh, J.*) LAL SINGH *v.* EMPEROR 164 I.C. 373=37 Cr.L.J. 940=9 R.L. 111=38 P.L.R. 881=1936 Cr.C. 736=A.I.R. 1936 Lah. 707.

——S. 114—*Presumption—Extent of—Woman sleeping in room containing two cots—Presumption that her husband must have slept on other cot on particular night—If justified.*

The illustrations to S. 114 show the extent to which Court may draw presumptions and clearly S. 114 is no justification for a Court presuming without evidence that because a woman sleeps in a room with two cots, her husband, an inmate of house, must have slept on the other cot on a particular night. (*Davis, J.C. and Weston, J.*) SHEWAKRAM ISSARDAS *v.* EMPEROR. 182 I.C. 464=12 R.S. 8=40 Cr.L.J. 661=A.I.R. 1939 Sind 130.

——S. 114—*Presumption of fact—When to be raised—Duty of Court—Effect of burden of proof on the raising of presumption—Duty of Court to look at entire evidence in arriving at finding of fact.*

Presumptions of fact are assumptions resulting from one's experience of the course of natural events of human conduct and human character, assumptions which one is entitled to make use of and

has to make use of in the ordinary business of life as well as the business of Courts. A Judge of fact may raise such presumptions to assist him, if he thinks them likely in relation to the facts of the case with which he is dealing. It is always a question for the Judge of fact in any particular case whether he will make use of such an assumption, whether he will raise such a presumption of fact. His discretion in the matter is subject to reconsideration by an appellate Court, if there is an appeal on facts. If the burden of proof lies upon one party, it is not reasonable to raise a presumption of fact which begs the question in favour of that party. In such a case in which a finding of fact has to be made, it is the Court's duty to take into consideration all the evidence available in regard to facts and to draw such inferences as appear reasonable from that evidence with the aid of such presumptions of fact as appear reasonable to the Court in all the circumstances of the case not forgetting upon whom the burden of proof lies. (*Reilly, C.J. and Chari, J.*) SAMBAYA CHETTY *v.* RUDRAPPA. 14 Mys.L.J. 491=42 Mys. H.C.R. 163.

——S. 114—*Scope.*

Section 114 includes, but is not limited to the presumption of 'regularity'. (*Ameer Ali, J.*) HARIDAS CHATTERJEE *v.* MANMATHANATH MULLICK. 160 I.C. 332=8 R.C. 423=A.I.R. 1936 Cal. 1.

——S. 114—*Scope—Mother and daughter dying together in earthquake—Presumption that mother died first—If arises.*

Where a mother and daughter met their death in the Quetta earthquake and there is no reliable evidence to show which of the two died first, there can be no presumption in law that the elder died before the younger. (*Davis, J.C. and Tyabji, J.*) GOPIBAI *v.* CHUHERMAL MULCHAND. I.L.R. (1939) Kar. 509=183 I.C. 717=12 R.S. 71=A.I.R. 1939 Sind 234.

——S. 114—*Scope—Party ordered to appear for further cross-examination—Failure to appear—Inference.*

When a party is ordered by the Court to reappear and submit to further cross-examination on a certain point, but he never cares to enter into the witness-box and deliberately keeps away, the Court is justified in drawing an inference unfavourable to his case. (*Mitter and Patterson, JJ.*) CREET *v.* GANGARAJ GULRAI FIRM. I.L.R. (1937) 1 Cal. 203=64 C.L.J. 280=170 I.C. 214=10 R.C. 111=A.I.R. 1937 Cal. 129.

——S. 114—*Scope—Regularity of official acts—Presumption of—Settlement proceedings—Demarcation—Absence of evidence to show—Effect of.*

The mere fact that there is no evidence to show that certain land, which is the subject-matter of a settlement in a touzi was demarcated, does not give rise to a presumption that there was no demarcation, such an assumption is clearly against the statute of the land. If an official act has been proved to have been done, it must be presumed to have been regularly done. (*Wort and Agarwala, JJ.*) RAM RAM RAMBIJAYA PRASAD SINGH *v.* KRISHNA MADHO. 5 B.R. 864=182 I.C. 982=12 R.P. 89=20 Pat.L.T. 677=A.I.R. 1939 Pat. 364.

——S. 114, Ill. (a)—Applicability—Possession of stolen property two and half years after theft

—Person in possession running away when asked to explain—Presumption of guilty knowledge—If justified. *See* PENAL CODE, S. 411. 17 Pat.L.T. 754.

——S. 114, Ill. (a)—*Applicability—Prosecution under S.* 401, *I. P. Code—Stolen property found in possession of various accused after six months—Signs pointing to association in crime—Inference.*

Per *Gruer, J.*—With regard to applicability of the presumption under S. 114, Evidence Act, a prosecution under S. 401, I. P. Code, is of a peculiar nature differing from an ordinary case, in respect of numbers of accused involved and the extent of time covered by their operations. There can be no definite rule of limitation barring responsibility for stolen property after a certain time. Each case must be judged in view of the circumstances. Important factors are the number of articles recovered and the way in which information led to recovery. Various articles of stolen property were found in possession of various accused after six months. There were also signs pointing to their association in crime.

Held, that there was presumption that the articles were stolen property. (*Grille, J. C., Niyogi and Pollock, A. J. Cs.*) AMDUMIYAN GULJAR *v.* EMPEROR. I.L.R. (1937) Nag. 315=166 I.C. 582 and 587=9 R.N. 126 and 132=38 Cr.L.J. 237 and 251=A.I.R. 1937 Nag. 17 (F.B.).

——S. 114, Ill. (a)—*Finding of article concerned in offence in possession of accused long after offence—Inference to be drawn—Nature and value of—Omission of accused to explain—Effect.*

The question whether an inference should be drawn against an accused person from unexplained possession of property concerned in an offence with which he is charged may sometimes be very strongly affected by the interval between the date of the offence and the date when the property is found to be in his possession. If an accused person is found to have in his possession, after a considerable interval, property concerned in the offence, and gives an apparently reasonable explanation, that explanation may be more readily accepted than if the article is found in his possession almost immediately after the offence. But in such a case, if no explanation is given, the fact that possession of the articles concerned by the accused has been proved, if he does not explain it, is of far greater importance than the point of time when he disclosed his possession of it by any overt act. (*Reilly, C.J. and Singaravelu Mudaliar, J.*) *In re* ERAPPA. 17 Mys.L.J. 158.

——S. 114, Ill. (a)—*Interval between commission of offence and recovery of property stolen or robbed—Presumption of receipt of stolen property—If justified—Duty of Judge to direct jury to consider interval—Accused absconding knowing of search—If justifies presumption.*

When property stolen or robbed are recovered from a person after the lapse of more than a month from the commission of theft or robbery, the interval between the two has got to be considered, and the Judge must tell the jury that they should consider for themselves whether the date of arrest of the accused and the finding of the property with him are sufficiently near to the date of the offence to justify their making the presumption under S. 114, Ill. (*a*) of the Evidence Act. But where the accused is found to have kept out of the way and absconded knowing of search, that entitles the jury to bridge over the interval. (*Horwill, J.*) THEVAR SERVAI *v.* EMPEROR. 173 I.C. 450=1938 M.W.N. 215=10 R.M. 587=39 Cr.L.J. 323=1938 M.Cr.C. 1=A.I.R. 1938 Mad. 477.

——S. 114, Ill.(a)—*Order of attachment—Compliance with formalities—Presumption, when process-server's report is available—C. P. Code, O.* 21, *R.* 54.

If the only evidence available is an order of the Court showing that attachment had been made, it would no doubt be presumed that all the necessary formalities were complied with. But where the execution record is available and the process-server's report regarding the attachment does not show that any copy of the order was posted on a conspicuous part of the Court house, the initial presumption is what is not mentioned therein was not done. (*Bhide, J.*) MAIDATT MANAK CHAND *v.* MST. LACHHO. 41 P.L.R. 149=A.I.R. 1939 Lah. 284.

——S. 114, Ill. (a)—*Presumption under—Accused failing to account for possession of stolen goods due to not being asked to so account—Inference of guilt—If justified—Accused's explanation reasonably true but not believed—Presumption, if arises—Misdirection.*

In order to enable the prosecution to draw the presumption under S. 114, Ill. (*a*) of the Evidence Act, the accused must first have been asked to account for the possession of stolen goods found on him. When he is not asked to account for his possession of the goods it is not correct to say that he cannot account for his possession. Where, therefore, the Sessions Judge tells the jury that in case they did not believe the statement of the accused they could presume that he is either a thief or received or retained possession of the stolen goods, that is a misdirection. Under S. 114, even if the jury are not inclined to believe the statement of the accused, still if they think that his statement might be reasonably true, they are not entitled to make the presumption against the accused. (*Lort Williams and Jack, JJ.*) SURENDRA NATH GHOSE *v.* EMPEROR. 40 C.W.N. 1090.

——S. 114, Ill. (a)—*Presumption under—Nature of.*

The Court is entitled to presume that a person found in possession of property which had been stolen is either the receiver or the actual thief. The nature of the presumption in each individual case depends entirely upon the nature of the evidence adduced. Where a long interval has elapsed before the stolen property has been recovered it is often unsafe to assume that the possessor is the actual thief. The highest presumption which can be drawn from possession of stolen property by itself, and in the absence of any other evidence, is presence at the scene of theft. Where it is shown that only one person is present at the scene of theft and it is clear that the murder has been committed, the logical conclusion to be drawn from that is that the possessor of the stolen property is the person who committed the crime; but in a case in which there are several persons involved and question of common intention arises, great care must be taken not to assume that the person merely found in possession of the stolen property should have attributed to him for this reason alone, a common intention respecting the guilt of murder. (*Roberts, C.J.*

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and Dunkley, J.) NGA THEIN PE *v.* THE KING. 184 I.C. 545=12 R.R. 155=41 Cr.L.J. 44=A.I.R. 1939 Rang. 361.

———S. 114, Ill. (a)—*Presumption under—Option of Court.*

Under S. 114, Ill. (*a*) of the Evidence Act, there is a presumption against a man in possession of recently stolen goods that he knew them to be stolen. But it is not necessary for the Court to rely on that presumption, if the acts do not warrant it. (*Young, C. J. and Monroe, J.*) EMPEROR *v.* SAIFAL. 18 Lah. 227=171 I.C. 342=38 Cr.L.J. 1066=39 P.L.R. 1=10 R.L. 185=A.I.R. 1937 Lah. 700.

———S. 114, Ill. (a)—*Presumption under—Person in possession of stolen property—Presumption of his guilt—When arises—Penal Code, S.* 411.

Under S. 114 of Evidence Act, the Court may if the circumstances justify it, draw a presumption of guilt against a person who is in possession of stolen property; but the section does not lay down that whenever a person is in possession of stolen goods, a presumption of his guilt automatically arises. The illustration itself shows that the presumption will not arise unless the accused is in possession of the goods soon after the theft and unless he is unable to account for his possession. If several months have passed or if the accused is able to give an apparently reasonable explanation of his possession of the stolen property, the presumption will not arise. S. 114 does not relieve the prosecution of the onus of proving the accused's guilt in respect to a charge under S. 411, I. P. Code. (*Collister, J.*) GIYAN CHANDRA *v.* EMPEROR. 166 I.C. 363=9 R.A. 403=1937 All.L.R. 26=38 Cr.L.J. 196=1936 A.L.J. 1158=1936 A.Cr.C. 212 (2)=1936 A.W.R. 973=A.I.R. 1937 Lah. 47.

———S. 114, Ill. (a)—*Scope—Charge of murder, robbery and receiving stolen property—Murder and robbery alleged to be simultaneous and part of same transaction—Finding of articles concerned in robbery in possession of accused—Nature of presumption to be drawn.*

On a charge under Ss. 302, 392 and 411, I. P. Code, it being the case of the prosecution that murder and robbery were parts of one transaction and were simultaneously done, if property stolen in the very robbery done at the time of the murder is found in the possession of the accused, it may be presumed under S. 114, Ill. (*a*) of the Evidence Act, that the accused was either involved in the murder and robbery or at least received stolen property knowing the same to be the proceeds of the robbery. But when the question arises whether the presumption of the graver offence or of the lesser offence is to be drawn, it is for the prosecution to establish the graver presumption rather than for the graver presumption to be drawn in the absence of an explanation from the accused. The Court must see if there are materials to show that the accused was not merely a receiver of stolen property but was himself the murderer or actively concerned in the murder. (*Varma and Rowland, JJ.*) EMPEROR *v.* MAYADHAR POTHAL. 18 Pat. 450=5 B.R. 706=181 I.C. 1001=11 R.P. 653=40 Cr.L.J. 625=1939 P.W.N. 300=20 Pat.L.T. 420=A.I.R. 1939 Pat. 577.

———S. 114, Ill. (a)—*Scope—Person points out place of concealment of stolen property—Presumption—Conviction for theft or receipt of stolen property—Sustainability.*

The mere fact that a person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114 of the Evidence Act, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft. (*Broomfield and Norman, JJ.*) EMPEROR *v.* YESHABA SAKHOBA. 40 Bom.L.R. 927=178 I.C. 330=11 R.B. 155=40 Cr.L.J. 48=A.I.R. 1938 Bom. 463.

———S. 114, Ill (a)—*Stolen property recovered from accused three weeks after burglary—If sufficient evidence for conviction under S.* 411, *I. P. Code.*

Evidence of recovery of stolen property from the house of the accused about three weeks after the commission of the burglary is sufficient for his conviction under S. 411, I. P. Code. (*Abdul Rashid, J.*) SINGHA *v.* EMPEROR. 40 P.L.R. 58=174 I.C. 849 (1)=39 Cr.L.J. 491=10 R.L. 619=A.I.R. 1938 Lah. 252.

———S. 114, Ill. (a)—*Unexplained possession of stolen property if sufficient to warrant presumption.*

When unexplained possession of stolen property is the only circumstance appearing in the evidence against the accused, it is not enough to warrant a presumption of complicity. (*Grille and Gruer, JJ.*) MT. JAMUNIA PARTAP LOHAR *v.* EMPEROR. I.L.R. (1936) Nag. 78=164 I.C. 964=37 Cr.L.J. 1047=9 R.N. 48=1936 Cr.C. 814=A.I.R. 1936 Nag. 200.

———S. 114, Ill. (b)—*Accessory after crime—Evidence of—Need for corroboration—Murder in presence of accused's wife—Wife not giving information to police—If an accessory after the fact.*

The evidence of an accessory after a crime suffers more or less from the same taint as the evidence given by an accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of the accused without independent corroboration in material particulars. Where murder was committed in the presence and within the sight of the accused's wife who was, therefore, under S. 44, Cr. P. Code, under a legal obligation of forthwith giving information to the nearest Magistrate or police officer but did not do so her conduct in not divulging the crime was clearly intended to assist the accused and she must be regarded as an accessory after the fact. The accused cannot, therefore, be convicted on her solitary statement in the absence of independent corroboration of her evidence. (*Srivastava, Ag.C.J. and Zia-Ul-Hasan, J.*) EMPEROR *v.* KALLOO. 13 Luck. 115=166 I.C. 667=9 R.O. 328=38 Cr.L.J. 286=1937 A.Cr.C 28=1937 O.W.N. 104=1937 O.L.R. 33=A.I.R. 1937 Oudh 259.

———S. 114, Ill. (b)—*Accessory after crime—Testimony of—Corroboration, if necessary.*

The testimony of the accessories after the commission of the crime cannot be accepted as proving the guilt of the accused without corroboration in material particulars by independent witnesses. (*Nanavutty and Zia-ul-Hasan, JJ.*) BRIJPAL SINGH *v.* EMPEROR. 12 Luck. 415=165 I.C. 138=37 Cr.L.J. 1065=9 R.O. 157=1936 O.W.N. 892=1936 Cr.C 1079=1936 O.L.R. 596=A.I.R. 1936 Oudh 413.

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——Ss. 114, Ill. (b) and 133—*Accomplice—Accessory after fact—Person assisting in disposal of dead body without taking part in actual murder—If accomplice.*

Indian law does not recognize any such thing as an accessory after the fact. A man who does not abet a crime cannot be regarded as an accomplice. Although a person who assists in disposal of the dead body may become liable to punishment under S. 201, Penal Code, this is quite another offence, and helping to dispose of the body of a man who had been murdered, without having taken any part in the murder itself, does not make a man an accomplice with regard to the murder. (*Baguley and Shaw, JJ.*) NGA PAUK *v.* EMPEROR. 172 I.C. 911=10 R.R. 286=39 Cr. L.J. 200=A.I.R. 1937 Rang. 513.

——Ss. 114, Ill. (b) and 133—*"Accomplice"—Co-accused pleading guilty and implicating other accused—Conviction on own account—Removal from dock—Examination as witness—Value of such testimony—Corroboration.*

A witness is none the less an accomplice even though he has already been convicted on his account. Where one of the accused who pleads guilty and implicates the other is removed from the dock and examined as a witness with a view to get better value for his evidence than would be possible if he were treated as a co-accused, he is still virtually an accomplice; and though it is not illegal to base a conviction on his evidence, the more prudent course is to require corroboration of his evidence. (*Abdul Ghani, J.*) NARSIMHIAH *v.* GOVERNMENT OF MYSORE. 16 Mys.L.J. 147.

——S. 114, Ill. (b)—*Accomplice—Corroboration—Necessity—Rule as to—Nature and extent of corroboration required—Direct evidence—If necessary.*

It has long been a rule of practice for a Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and it is in the discretion of the Judge to advise them not to convict upon such evidence, but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence. This rule of practice, which has virtually become a rule of law has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required as corroboration is some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it. It is not necessary to require confirmation of all the circumstances of the crime. It is sufficient if there is confirmation as to a material circumstance of a crime and of the identity of the accused in relation to the crime. There must, in other words, be confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. (*Davis, J.C. and Mehta, A.J.C.*) KHADIM *v.* EMPEROR. 31 S.L.R. 82=169 I.C. 716=10 R S. 17=38 Cr.L.J. 808=A.I.R. 1937 Sind 162.

——S. 114, Ill. (b)—*"Accomplice"—Detective supplying marked money and placing bets with accused for detection of crime—If "accomplice"—Necessity for corroboration.*

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly indicted with the defendant (principal). The act of a detective in supplying marked money and placing bets with the accused for detection of a crime has not the element of *mens rea* and so cannot be treated as that of an accomplice and hence his evidence does not require corroboration. (*Gruer, J.*) GOVINDA BALAJI *v.* EMPEROR. I.L.R. (1937) Nag. 181=167 I.C. 521=9 R.N. 193=38 Cr.L.J. 423=1936 Cr. C. 1039=A.I.R. 1936 Nag. 245.

——S. 114, Ill. (b)—*Accomplice—Evidence of—Corroboration by another accomplice—Sufficiency.*

It cannot be laid down absolutely that corroboration of one accomplice by another accomplice is not corroboration at all. The evidence of an approver can be acted upon without corroboration, there can therefore be nothing illegal in acting on the statements of accomplices that has been rendered more credible by agreement between them on the details elicited in cross-examination. The illustrations to S. 114, Evidence Act, themselves show that in cases where accomplices corroborate one another, there is much greater reason for accepting their evidence. (*Horwill, J.*) SATTAR KHAN *v.* EMPEROR. 181 I.C. 364=11 R. M. 797=40 Cr L.J. 483=1938 M.Cr.C. 287=1938 M.W.N. 962=A.I.R. 1939 Mad. 283.

——S. 114, Ill. (b)—*Accomplice—Evidence of—Corroboration in every detail—If necessary.*

It is not necessary that the story of an accomplice should be corroborated in every detail of the crime, nor is it necessary that the corroborative evidence should itself be enough for conviction; when it is established that there are good grounds for believing the accomplice's story by reason of the existence of corroboration on material points implicating any of the accused the Court can safely come to a conclusion as to the truth of the whole story on uncorroborated points so far as they implicate the same accused person. (*Roberts, C.J. and Baguley, J.*) GAFOOR *v.* EMPEROR. 164 I.C. 677=37 Cr.L.J. 992=9 R. R. 125=1936 Cr. C. 775=A.I.R. 1936 Rang. 373.

——Ss. 114, Ill. (b) and 133—*Accomplice—Evidence of—Duty of Court.*

Ill. (*b*) to S. 114 of the Evidence Act is to be read along with S. 133, and neither rule is to be ignored in the exercise of judicial discretion. It is the duty of the Court which has to deal with an accomplice's testimony to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the Court may rightly in exceptional cases, in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon other grounds. 21 W. R. (Cr.) 69, Foll. (*King, C.J. and Nanavutty, JJ.*) BABOO SINGH *v.* EMPEROR. 11 Luck. 662=159 I.C. 875=37 Cr. L.J 163=8 R.O. 212=1936 O.W.N. 64=1936 Cr.C. 274=1936 O.L.R. 5=A.I.R. 1936 Oudh 156.

——Ss. 114, Ill. (b) and 133—*Accomplice—Evidence of—Need for corroboration.*

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It is wholly unsafe in any case to proceed solely upon uncorroborated testimony of an accomplice. The rule of caution embodied in Ill. (*b*) to S. 114, Evidence Act, is as good as a rule of law for all practical purposes. The two sections of the Evidence Act, namely, S. 133 and S. 114 when read together lay down that the evidence of an accomplice must be corroborated in some material particulars, not only bearing upon the facts of the crime but upon the accused's implication in it. Further, evidence of one accomplice is not available as corroboration of another. (*Patterson, Nasim Ali and Biswas, JJ.*) NITAI CHANDRA JANA *v.* EMPEROR. 170 I.C. 201=38 Cr.L.J. 852=10 R.C. 98=A.I.R. 1937 Cal. 433 (S.B.).

——S. 114, Ill. (b)—*Accomplice—Evidence of—Several accused—Need for corroboration in regard to each.*

One accomplice cannot corroborate another. The case of each of the accused must be taken on its merits and independent corroborative testimony must be sought for in every instance. It is not enough to find such corroboration as regards the presence and participation in the crime by several of the accused and then to conclude that the evidence of the accomplices must be true so far as it implicates the rest. The rule of prudence demands that the evidence of accomplices should be corroborated in material particulars implicating each of the accused. Where there are a number of accomplices giving evidence against seven accused persons it is a mistake, having found corroborative evidence implicating four of them to assume that the story of the accomplices does not require corroboration as regards the identity of the other three. (*Roberts, C.J.*) NGA PO AUNG *v.* EMPEROR. 170 I.C. 645=38 Cr.L.J. 948=10 R.R. 101=A.I.R. 1937 Rang. 264.

——S. 114, Ill. (b)—*Accomplice—Evidence of—Need for corroboration.*

In dealing with a question which has to be decided under Ss. 133 and 114 and Ill. (*b*), thereunder, the following propositions should be noted. *First*: Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and if this be the case a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted. *Secondly*: that evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. *Thirdly*: that corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct. The above conclusions apply to approvers also. 9 Rang. 404 and A.I.R. 1937 Rang. 209, Overr. (*Roberts, C.J., Baguley, Mosely, Ba U, Dunkley, Braund and Shaw, JJ.*)

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——S. 114, Ill. (b)—*Accomplice—Evidence of—Presumption.*

It is not desirable that in cases where the evidence of an accomplice is tendered, the Court should call for proof of the presumption that he is unworthy of credit unless corroborated in material particulars. Experience has shown that in the generality of cases it is unsafe to convict upon the uncorroborated testimony of an accomplice alone, although it is not illegal to do so. The Court should therefore regard an accomplice as *prima facie* unworthy of credit, but this presumption which it is open to the Court to draw is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case. (*Roberts, C.J., Baguley, Mosely, Ba U, Dunkley, Braund and Shaw, JJ.*) THE KING *v.* NGA MYO. 1938 Rang.L.R. 190=175 I.C. 465=10 R.R. 494=39 Cr.L.J. 581=A.I.R. 1938 Rang. 177 (F.B.).

——Ss. 114 (b) and 133—*Accomplice—Evidence of—Value—Independent corroboration—Necessity—Conviction, if can be based upon.*

Under S. 114 (*b*) of the Evidence Act a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. Where there is a plurality of accomplices the Court might, while not losing sight of S. 114 (*b*) still be able to rely on the uncorroborated testimony of one or more out of a number either on the same or on different points. Moreover it is open to a Court to depart from the general rule, if it thinks that there are special circumstances in the case making it safe to do so, and in such cases, S. 133 of the Evidence Act makes it clear that conviction is not illegal merely because it is based upon the uncorroborated testimony of an accomplice. (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. I.L.R. (1938) Nag. 516=1938 N.L.J. 185=176 I.C 853=11 R.N. 81=39 Cr.L.J. 818=A.I.R. 1938 Nag. 328.

——S. 114, Ill. (b)—*Accomplice—Meaning of.*

A person who is liable to be suspected of the offence of murder along with the accused and who was in the company of the deceased at the time of the murder cannot on that account be held to be an accomplice, though he or she may not have made any attempt to prevent the commission of the offence. Where there is no indication at all, in the evidence that that person shared with the accused any intention that the deceased should be killed, that person cannot be held to be an accomplice whose evidence requires corroboration under the Evidence Act. (*King and Lakshmana Rao, JJ.*) VENKADU *v.* EMPEROR. 181 I.C. 933=11 R M. 883=49 L.W. 175=40 Cr.L.J. 606=1938 M.Cr.C 349=1938 M.W.N. 1272=A.I.R. 1939 Mad. 266.

——S. 114, Ill. (b)—*"Accomplice"—Meaning of—Police decoys instigating persons to commit crime in order to catch them in the act of committing crime—Evidence of—Corroboration—Necessity.*

Even where the object of the persons who instigate another to commit a crime is to catch

him in the act of committing the crime, *e.g.*, police decoys, the instigation amounts to an abetment of the offence, and the abettors must be regarded as accomplices when the object of the instigation is to make the offender commit the crime and the person who is instigated actually commits the offence. Even if they are not accomplices in the strict legal sense, their evidence has to be viewed with caution, and it is not safe to act upon their evidence without material corroboration. (*Pandrang Rao, J.*) APPAYYA *v.* GOPALAKRISHNAYYA. 178 I.C. 616=11 R.M. 478=40 Cr.L.J. 108=1938 M.Cr.C. 252=1938 M.W.N. 825=48 L.W. 322=A.I.R. 1938 Mad. 893.

——S. 114, Ill. (b)—*Accomplice—Testimony of—Corroboration required.*

The evidence of one accomplice cannot be corroborated by that of another. Corroboration means independent testimony. Where it is required, it is necessary because the evidence sought to be corroborated it in some way unreliable. When in the case of an accomplice it is desirable because the accomplice's evidence comes from a tainted source, the nature of the corroboration required is not more evidence of a tainted kind but fresh evidence of an untainted kind. 9 Rang. 404, Diss. from. (*Roberts, C.J. and Leach, J.*) AUNG PE *v.* EMPEROR. 1937 Rang L.R. 110=169 I.C. 705=10 R.R. 19=38 Cr.L.J. 785=A.I.R. 1937 Rang. 209.

——S. 114, Ill. (b)—*'Accomplice'—Wife cognisant of accused's intention to kill her husband, keeping quiet—Value of her evidence.*

A wife who is cognisant of the fact that the accused intended to kill her husband but did not disclose that fact to him, must be regarded as an accomplice, and her testimony cannot carry any higher value than the testimony of an accomplice. (*Young, C J. and Abdul Rashid, J.*) PHULLU *v.* EMPEROR. 164 I.C. 700=9 R.L. 157=37 Cr.L J. 978=38 P.L.R. 226=1936 Cr C. 766=A.I.R. 1936 Lah. 731.

——S. 114, Ill. (b)—*"Accomplice"—Witness not revealing knowledge of intended crime to authorities—If accessory or accomplice.*

The mere fact that a witness did not reveal the knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or an accomplice so as to vitiate his evidence. (*Bartley and Rau, JJ.*) NURALAMIN *v.* EMPEROR. I.L.R. (1939) 1 Cal. 511=182 I.C. 386=40 Cr.L. J. 667=A.I R. 1939 Cal. 335.

——S. 111, Ill. (b)—*Approver—Corroboration—Extent and nature.*

An approver does not corroborate himself. A previous statement of an approver is no corroboration of a later statement by the same approver. Before it is safe to convict on the evidence of an approver, who is generally a man of little worth, there must be corroboration in material particulars, and corroboration not only as to the actual factum of the crime, so that the Court is satisfied that the approver speaks the truth when he speaks to the actual factum of the murder, but that there must be a corroborative evidence of the approver when he speaks to the identity of the accused, because while he may speak truly as to the actual factum of the murder, he may speak falsely when he speaks as to the identity of the accused. So that there must be some evidence which associates or tends to associate each individual accused with the crime. (*Davis, J.C. and Lobo, A.J.C.*) KHAIRO *v.* EMPEROR. 31 S.L.R. 470=170 I C. 922=10 R S. 77=38 Cr.L.J. 995=A.I.R. 1937 Sind 221.

——S. 114, Ill. (b)—*Approver—Evidence of—Appreciation—Proper method.*

Where a charge of conspiracy depends upon the evidence of an approver, the Judge should make up his mind whether he is going to believe the approver and if he thinks that the approver's evidence is unsatisfactory and suspicious, he should disbelieve it altogeter. If on the contrary he comes to the conclusion that inasmuch as there is corroborative evidence, it does not matter much whether the approver is telling the truth or not, he would be approaching the case from a wrong point of view. (*Cunliffe and Henderson, JJ.*) KHIDIR *v.* EMPEROR. 66 C.L.J. 575.

——S. 114, Ill. (b)—*Approver—Evidence of—Corroboration by confession of co-accused.*

An approver can be corroborated by the confession of a person who is being tried jointly, with the accused for the same offence implicating both himself and the accused; and a confession which is subsequently retracted may equally well be used to corroborate an approver, though it is the duty of the Court to scrutinize such corroboration with very great care. (*Spargo, J.*) NGA HLA MAUNG *v.* EMPEROR. 169 I.C. 425=10 R.R. 4=38 Cr.L.J. 774=A.I.R. 1937 Rang. 218.

——S. 114, Ill. (b)—*Approver—Evidence of—Corroboration—Necessity.*

An approver's evidence cannot be accepted without corroboration. (*Norman.*) RAHIM BUX *v.* EMPEROR. 1937 A.M.L.J. 18.

——S. 114, Ill. (b)—*Approver—Evidence of—Corroboration required.*

The evidence of an approver can be corroborated by the confession of a person, who is being tried jointly with the accused for the same offence, and this principle applies even where both the approver and the confessor subsequently retract their statements. A.I.R. 1933 Rang. 57, Rel. on. (*Spargo, J.*) NGA TUN SHWE *v.* EMPEROR 169 I.C. 45=9 R.R. 384=38 Cr.L.J. 705=A.I.R. 1937 Rang. 116.

——S. 114, Ill. (b)—*Approver—Evidence of—Corroboration required—Statement of accused connecting him with crime—If sufficient corroboration.*

Corroborative evidence tending to connect the accused with the crime described by an approver does not need to be evidence connecting the accused in every detail with the particular crime. Evidence is only required which tends to connect the accused with the crime. The statement of the accused connecting him with the crime described by the approver is the most powerful form of corroboration of an approver that one could have. (*Young, C.J. and Monroe, J.*) MT. KHUSHALIA *v.* EMPEROR. 40 P.L.R. 61=175 I.C. 548=10 R.L. 743=39 Cr.L.J. 621=A.I.R. 1938 Lah. 339.

——S. 114, Ill. (b)—*Approver—Evidence of—Necessity for corroboration.*

The evidence of an accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it. Evidence of one ac-

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complice is not available as corroboration of another. The rule, although a rule of practice, is now virtually a rule of law, and is of greatest importance, in a case where three persons are implicated in a crime and one or two of them exculpates himself or themselves by fastening the guilt upon other, more specially when all the accused have originally given false statements and belong to a class of persons who are at best not reliable witnesses. *The King* v. *Baskerville*, (1916) 2 K.B. 658, Rel. on. (*Sir Sydney Rowlatt.*) MAHADEO *v.* EMPEROR. **163 I.C. 681=8 R.P.C. 51=44 L.W. 253=1936 A.L.J. 869=1936 A.W.R. 741=40 C.W.N. 1164=37 Cr.L.J. 914=1936 M.W.N. 889=38 Bom.L.R. 1101=1936 Cr.C. 757=1936 P.W.N. 660=A.I.R. 1936 P.C. 242 (P.C.).**

———**S. 114, Ill. (b)**—*Approver—Evidence of—Necessity for corroboration.*

A conviction of an accused person cannot be sustained upon the uncorroborated testimony of the approver, and the evidence of one accomplice is not available as corroboration of another. (*Namavutty, J.*) BHABHUTTI *v.* EMPEROR. **165 I.C. 144=37 Cr.L.J. 1096=9 R.O. 164=1936 O.W.N. 848=1936 O.L.R. 595.**

———**S. 114, Ill. (b)**—*Approver—Evidence of—Necessity for corroboration.*

No matter how strong a motive is proved, it is unsafe to convict on the evidence of an approver unless there is corroboration connecting or tending to connect the particular accused with crime itself. The mere uttering of a threat some months before the murder took place, even if it was established by satisfactory evidence over and above to that given by the approver that such a threat had been proved, cannot of itself be taken to show that the person uttering the threat was connected with the death, which took place some months later, of the person against whom the threat had been uttered. (*Young, C.J. and Monroe, J.*) KARTAR SINGH *v.* EMPEROR. **17 Lah. 518=162 I.C. 511=37 Cr.L.J. 597 (1)=8 R.L. 916=38 P.L.R. 949=1936 Cr.C. 355=A.I.R. 1936 Lah. 400.**

———**S. 114, Ill. (b)**—*Approver—Evidence of—Retracted confession of co-accused—If corroborative evidence.*

The evidence of an approver who does not scruple to tell different stories on different occasions on oath is not a very strong basis for a conviction though undoubtedly legally it could be such. The retracted confession of a co-accused cannot be considered to be sufficient corroboration of his evidence. (*Young, C.J. and Blacker, J.*) FAQIR SINGH *v.* EMPEROR. **184 I.C. 219=12 R.L. 183=40 Cr.L.J. 897=41 P.L.R. 333=A.I.R. 1939 Lah. 429.**

———**S. 114, Ill. (b)**—*Approver—Evidence of—Sufficiency for conviction—Practice.*

The practice of the Allahabad High Court is clear that an accused person should not be convicted solely upon the evidence of an approver. To support a conviction the approver's evidence must be corroborated in material particulars. (*Harries and Rachhpal Singh, JJ.*) MATHURI *v.* EMPEROR. **58 All. 695=163 I.C. 253=37 Cr.L.J. 794=8 R.A. 928 (2)=1936 A.L.J. 518=1936 A. Cr. C. 15=1936 A.W.R. 1=1936 All.L.R. 539=1936 Cr.C. 401=A.I.R. 1936 All. 337.**

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———**S. 114, Ill. (b)**—*Approver—Statement of—Corroboration by circumstantial evidence—Statement, if can be relied on.*

The statement of an approver can be relied on where it is corroborated in material particulars by strong circumstantial evidence. (*Abdul Qayoom, C.J.*) BHAGAT SINGH *v.* STATE. **39 P.L.R. J. & K. 42.**

———**S. 114, Ill. (b)**—*Approver or accomplice—Need for corroboration.*

Whether a witness is stigmatized as an approver or as an accomplice, he is as regards the matter of corroboration on one and the same footing. (*Costello, Jack and M.C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 1=179 I.C. 506=11 R.C. 557=40 Cr.L.J. 199=68 C.L.J. 206=A.I.R. 1939 Cal. 65 (F.B.).**

———**S. 114, Ill. (b)**—*Approver's statement—Need for corroboration.*

The statement of an approver cannot be accepted in the absence of corroboration in material particulars connecting the accused with the crime. The existence of blood-stains on the clothes of the accused and the recovery at his instance of a gandasa with which he is alleged to have struck the deceased from a place which is neither owned nor possessed by him, are not sufficient corroboration of the approver's statement. (*Young, C.J. and Tek Chand, J.*) BIR SINGH *v.* EMPEROR. **42 P.L.R. 67.**

———**S. 114, Ill. (c)**—*Presumption under when arises—Person affixing thumb mark to bond, pleading fraud—Burden of proof.*

In a suit on a bond the primary burden is on the plaintiff. He must prove execution and consideration. But once he proves, or it is admitted, that the signature or thumb mark (it does not matter which) is the defendant's then the presumption arises and the burden shifts to the defendant. He can then either prove that he cannot be charged because of fraud, etc., or that the presumption under S. 114 cannot on the facts fairly arise. If he succeeds in doing that, then the burden shifts back to the plaintiff. (*Bose, J.*) UDEBHAN *v.* VITHOBA. **I.L.R. (1939) Nag. 160=180 I.C. 443=11 R.N. 358=1938 N.L.J. 459=A.I.R. 1939 Nag. 78.**

———**S. 114, Ill. (c)**—Scope—Promissory note by Hindu father—Suit after father's death against sons—Burden of proof—Presumption as to consideration—If any—Presumption under S. 114—Power of Court to raise from omission to adduce available evidence. *See* NEGOTIABLE INSTRUMENTS ACT, S. 118. **44 L.W. 784.**

———**S. 114, Ill. (d)**—Decision in rent suit—Value of—Continuance of relationship after suit—Presumption. *See* LANDLORD AND TENANT. **71 C.L.J. 100.**

———**S. 114, Ills. (d) and (g)**—*Old account books—Presumption from non-production.*

It is impossible to say that usually account books would be preserved for anything like a period of 40 years. One would on the other hand imagine that after the lapse of a decade or two such account books would not be preserved. They may as a matter of fact get destroyed. The Court, therefore, will not be prepared to draw any presumption against a party from their non-production. (*Sulaiman, C.J. and Bennet, J.*)

GANESHI LAL *v.* BHAGWAN SINGH. **1936 A.W. R. 547.**

———**S. 114, Ills. (e) and (f)**—Applicability—Prosecution under S. 76 (*b*), Bengal Embankment Act—Absence of proof of notification under S. 6—Effect—Presumption of due publication of notification. *See* BENGAL EMBANKMENT ACT, S. 6. **A.I.R. 1937 Pat. 14.**

———**S. 114, Ill. (e)**—Applicability—Warrant of search under S. 5, Madras Gaming Act—Presumption of regularity. *See* MADRAS GAMING ACT, S. 6. **1938 M.W.N. 421.**

———**S. 114, Ill. (e)**—*Attachment—Compliance with formalities—Presumption.*

Where the bailiff who carried out an attachment was examined as a witness and he has stated that the attachment was made in accordance with law, it is for the party asserting the contrary either to question the bailiff or to lead evidence on the point. (*Dalip Singh and Bhide, JJ.*) LACHHMAN SINGH *v.* DASAUNDHI RAM BABU RAM. **40 P.L.R. 142.**

———**S. 114, Ill. (e)**—*Decree passed by Court on compromise assented to by pleader—Authority of pleader to compromise—Enquiry by Court—Presumption.*

It must be assumed that a Court, which passed a decree on a compromise assented to by a pleader of one of the parties, satisfied itself that the pleader was authorised to effect a compromise on behalf of his client, unless the contrary is established. (*Jai Lal, J.*) NIAZ ALI *v.* BEGAM BIBI. **167 I.C. 264=9 R.L. 470=38 P.L.R. 467=A.I.R. 1937 Lah. 91.**

———**S. 114 (e)**—*Entry in the course of official routine—Presumption of accuracy.*

Where an entry in the Revenue Record is concerned which is made in the course of business, the usual inference under S. 114 (*e*) of the Evidence Act would be drawn as regards accuracy of these entries made in the course of official routine. (*Darling, S.M. and Mehta, J.M.*) PURAN LAL *v.* BALBHADAR PRASAD. **1938 R.D. 883.**

———**S. 114, Ill. (e)**—Official acts—Entries in record of rights—Presumption of due enquiry before making of entries. *See* BERAR LAND REVENUE CODE (1898), S. 96. **I.L.R. (1937) Nag. 395.**

———**S. 114, Ill. (e)**—*Official procedure—No presumption against accused that it is not carried out.*

One cannot presume against the interests of an accused person that the ordinary official procedure was not carried out. (*Blacker, J.*) UDMI *v.* EMPEROR. **39 P.L.R. 629.**

———**S. 114, Ill. (e)**—*Presumption in favour of official acts—When destroyed.*

The presumption in favour of official acts being properly done is destroyed when it is established that the investigating officers have not acted in a straightforward manner and have clearly made false statements in Court. (*Monroe and Rangi Lal, JJ.*) INDAR PAL *v.* EMPEROR. **162 I.C. 969=37 Cr.L.J. 732=8 R.L. 978=38 P.L.R. 1128=1936 Cr.C. 389=A.I.R. 1936 Lah. 409.**

———**S. 114, Ill. (e) and (f)**—Publication of natification under Bengal Embankment Act, S. 6—Presumption that judicial and official acts have been regularly performed and common course of business has been followed. *See* BENGAL EMBANKMENT ACT, S. 6. **A.I.R. 1937 Pat. 14.**

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———**S. 114, Ill. (e)**—*Report of Revenue Officer conducting sale—Admissibility and value.*

The report of a Revenue Officer conducting a sale is admissible in evidence, and there is a presumption attaching to such report, it being for the objector to show that anything was done irregularly. (*Addison and Din Mohammad, JJ.*) CHANDAR BHAN *v.* DATA RAM. **39 P.L.R. 187.**

———**S. 114, Ill. (f)**—*Certificate of posting—Presumption.*

Where a certificate of posting is put in evidence, the presumption is that the letter was posted and that it reached its destination unless something is shown to the contrary. It is entirely wrong for the Court to work on the presumption that the certificate of posting is a forgery. (*Sen, J.*) HEMANGINI DASSEE *v.* SARNALATIKA DASSEE. **A.I.R. 1940 Cal. 227.**

———**S. 114, Ill. (g)**—*Adverse inference—Suit on mortgage by manager of joint Hindu trading family—Denial of binding character of debt—Defendants not making discovery of accounts nor producing them though called on to do so—Inference.*

In a suit by the assignee of a deed of mortgage executed by the managing member of a joint Hindu trading family for the purpose of paying off trade debts of the family, to enforce the mortgage against the joint family properties, the original mortgagee having died before suit, the plaintiff applied to the Court for an order on the defendants to make discovery of their account books, and later on took out a subpoena against them for the production of the books. But the defendants neither made discovery nor produced the books at the hearing. They did not also go into the witness box to give evidence in support of the plea that the debts were not binding on the family.

Held, that the circumstances indicated that the defendants deliberately withheld from the Court evidence bearing on the question which was particularly within their knowledge and it was therefore proper for the Court to draw adverse inferences against them to the effect that had it been produced, it would have been fatal to their case. (*Venkatasubba Rao and Cornish, JJ.*) M. A. R. R. M. VISVANATHAN CHETTIAR *v.* RAMANATHAN CHETTIAR. **176 I.C. 1003=11 R.M. 228=1937 M.W.N. 913=46 L.W. 275=A.I.R. 1937 Mad. 816=(1937) 2 M.L.J. 559.**

———**S. 114, Ill. (g)**—*Failure of defendant to go into witness-box — Presumption—Defendant, a* pardanashin.

The defendant's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a *pardanashin* lady is not a sufficient excuse for her not getting herself examined even on commission. (*Srivastava, C.H. and Smith, J.*) MOHAMMAD ABBAS *v.* ABDUL BARI. **1937 O.W.N. 1022.**

———**S. 114, Ill. (g)**—*Non-production of evidence which is irrelevant and unnecessary for the case—If justifies adverse inference.*

It is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for its produc-

tion and inspection as evidence in the cause if he thinks proper. Hence where the creditor files an insolvency application on a promissory note executed in his favour and the debtor states that he has not received full consideration, the creditor is not bound to produce his account to show payment of full consideration. If the debtor relies on such accounts, it is for him to apply for their production. And no adverse inference can be drawn against the creditor (the applicant) from his non-production where the debtor has not summoned for them. (*Bose, J.*) PREMRAJ BHEORAJ *v.* NATHUMAL RUPCHAND. **I.L.R. (1936) Nag. 142 =164 I.C. 740=9 R.N. 31=A.I.R. 1936 Nag. 130.**

———**S. 114, Ill. (g)**—*Risk-note B—Railway Company undertaking to disclose to consignor how consignment was dealt with while in its control—Theft of goods from moving train—Company withholding evidence of guard—Adverse inference.*

A clause in a Risk-note of a Railway Company provided as follows: "The Railway Company shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct; but if misconduct on the part of the Railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall be upon the consignor." The goods were stolen from a running train. The Railway Company withheld the evidence of an important witness like the guard.

Held, the failure of the Railway Company to submit the evidence of the guard was in breach of its contractual obligation to give the evidence necessary for disclosure of how the consignment was dealt with. Hence the Court was entitled to presume, in terms of S. 114, Ill. (*g*) that the guard's evidence if produced would have been unfavourable to the Railway Company and that, in consequence, misconduct by complicity in the theft, of some servants of the company, might fairly be inferred from the company's evidence. (*Lord Thankerton.*) SURAT COTTON SPINNING AND WEAVING MILLS, LTD. *v.* SECRETARY OF STATE. **64 I.A. 176=I.L.R. (1937) Bom. 375=168 I.C. 1=9 R.P.C. 256=41 C.W.N. 837=3 B.R. 461 =1937 A.L.R. 347=46 L.W. 180=1937 M.W. N. 904=1937 P.W.N. 884=1937 A.W.R. 1159= 31 S.L.R. 326=39 Bom.L.R. 946=18 Pat.L.T. 767=1937 O.W.N. 1045=1937 A.L.J. 1117= 1937 O.L.R. 263=A.I.R. 1937 P.C. 152=(1937) 2 M.L.J. 689 (P.C.).**

———**S. 114, Ill. (g)**—*Scope—Accounts produced by defendant late—Rejection—Opposition by plaintiff—Right of plaintiff to request Court to draw adverse inference.*

Where a defendant fails to produce his account books before the Court in time, and they are rejected by the Court when produced as having been produced too late, the penalty for this conduct of the defendant is only to deprive the defendant of the benefit of the evidence afforded thereby. But it is not open to the plaintiff who has opposed their production to contend that an adverse inference ought to be drawn against the defendant from their non-production. (*Varadachariar and Abdur Rahman, JJ.*) SEVUGAN CHETTIAR *v.* ZAMINDAR OF SIVAGANGA. **1939 M. W.N. 841=A.I.R. 1940 Mad. 273.**

———**S. 114, Ill. (h)**—*Applicability—Criminal trial—Accused refusing to give account of what happened—Adverse inference—If justified.*

Persons accused of an offence may not have a very satisfactory explanation to offer for the circumstance in which they were found and they may prefer to say nothing. One cannot in all cases draw an adverse inference from the fact that the persons accused refuse to give their account of what happened. (*Mackney, J.*) E. CLARK *v.* EMPEROR. **172 I.C. 902=10 R.R. 298 =39 Cr.L.J. 187=A.I.R. 1937 Rang. 516.**

———**S. 115**—*Acquiescence—Building by tenant on nazul land—Long occupation and erection of pucca houses—Government not intervening—Ejectment suit—Equitable estoppel.*

Certain nazul land was let out by the Government to the defendant's ancestors for the purpose of building houses, on a monthly ground rent. The defendant's ancestors consequently erected pucca building on the land at a great cost without any intervention from the Government, during the period of 70 years of their occupation of the land. It was found that land similar in question in the town was let out to the people and they were allowed to build houses on it by charging a monthly rent for the use of the land. The Secretary of State brought a suit for recovery of arrears of rent against the defendant and for ejectment. The plaintiff was found to have been collecting rent for the land from the defendant for a long period before the suit.

Held, that inasmuch as the houses erected by the defendant and his ancestors were of a permanent nature and not mere temporary huts, the natural presumption was that the Secretary of State allowed the erection of those houses on the understanding that the person who erected the houses would remain in possession as long as the houses stood. Equitable estoppel therefore arose by implication and the Secretary of State was therefore estopped from ejecting the defendant as he acquiesced in the construction of the pucca buildings by the defendant and his ancestors; and by collecting the rent thereof for a number of years before his suit, he acquiesced in the existence of the defendant's houses on the land. (*Bennet, J.*) SECRETARY OF STATE *v.* ITWARI. **170 I.C. 944= 10 R.A. 207=1937 A.L.J. 783=1937 A.L.R. 772 =1937 A.W.R. 597=A.I.R. 1937 All. 512.**

———**S. 115**—*Acquiescence—Building on another's land not* bona fide—*Plea of estoppel—If can avail.*

Where the act of building upon the land of another is not *bona fide,* a plea of estoppel by acquiescence cannot avail. (*Thomas, C.J. and Zia-ul-Hasan, J.*) KANHAIYA LAL *v.* HAMIDALI. **185 I.C. 467=12 R.O. 243=1940 O.A. 408= 1940 O.W.N. 462=1940 A.W.R. (C.C.) 207 =1940 O.L.R. 16=A.I.R. 1940 Oudh 164.**

———**S. 115**—*Acquiescence — Company — Purchase of shares conditionally—Conditions not satisfied—Shareholder receiving dividends and authorizing company to sell his shares—Estoppel.*

Where a person purchases shares conditionally but allotment is made without conditions being carried out, and he acquiesces in that and further

receives dividends, and authorizes the company to sell his shares, he is not entitled subsequently to have his name removed from the register of shareholders. (*Young, C.J. and Monroe, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD., *In re.* **17 Lah. 793=166 I.C. 406=9 R.L. 375=38 P.L.R. 931=A.I.R. 1936 Lah. 700.**

——S. 115—*Acquiescence — Defendant constructing building on plaintiff's land—No objection raised by plaintiff—Plaintiff not aware of his rights—Effect.*

The question whether the defendant has made constructions on a *bona fide* belief that he had good title to the property will depend upon the circumstances of each case. The defendant cannot succeed on the plea of estoppel by acquiescence where the evidence showed that he knew that the plots in dispute were allotted to the plaintiff in the partition proceedings, and that the plaintiff was not aware of his rights. Acquiescence, in order to deprive a man of his rights, must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a manner as would make it fraudulent for him to set up those rights. The plea of acquiescence cannot, therefore, be held as established on the ground that the plaintiff raised no objection when the building was constructed on his land and that there was long delay in enforcing his rights, if any, in respect of the plots in question. 3 O.W.N. (Supp.) 282, Appl. (*Thomas, J.*) DAN BAHADUR SINGH *v.* TAELWAND SINGH. **167 I.C. 870=9 R.O. 412=1937 O.L.R. 175=1937 O.W.N. 330=A.I.R. 1937 Oudh 226.**

——S. 115—*Acquiescence—Elements of doctrine—Building on land by trespasser—Silence on the part of legal owner—If raises estoppel when there is no duty to speak—Principles.*

The doctrine of acquiescence is only another phase of estoppel. The foundation of the doctrine of estoppel and acquiescence is that one party has made to the other party representations which were intended to be acted upon and were in fact acted upon by the other party spending money or doing an act which he would not have otherwise done, which involved expenditure or a change of position. In the case of estoppel the material representations are active, while in the case of acquiescence the representations are to be inferred from silence. The doctrine of acquiescence also goes by the name of the doctrine of standing by. If an owner of land finds another person trespassing upon her land and building on it, mere silence or inaction on his part at the time will not be sufficient to support a case of acquiescence. Mere silence or mere inaction cannot be construed to be a representation. To support a case of acquiescence there must be something more than mere silence or inaction. Inaction or silence in circumstances which require a duty to speak is the foundation of the doctrine. When inaction or silence would amount to fraud or deception, then and then only can the doctrine of standing by or acquiescence be applied. The party seeking the aid of the doctrine has to prove (1) that he made a mistake of his legal rights; (2) that he expended money or did some act on the faith of the mistaken belief; (3) that the legal owner or possessor of the legal right knew of his own right which is inconsistent with the right claimed by

the party relying on the doctrine; (4) that the possessor of the legal right knew of the mistaken belief of the other; and (5) that the legal owner encouraged the other party in his expenditure of money or in the other acts, either directly or by abstaining from asserting his legal rights. (*R. C. Mitter, J.*) ABDUL KADER CHOUDHURY *v.* UPENDRA LAL BARUA. **167 I.C. 271=9 R.C. 675=40 C.W.N. 1370=A.I.R. 1936 Cal. 711.**

——S. 115—*Acquiescence—Outlay of money on another person's land—Acquiescence of true owner—Essentials to estop true owner.*

In the case of an outlay of money by a person on another's land the following essentials must coexist in order to constitute acquiescence which would estop the true owner. In the first place the person incurring expenditure must have made a mistake as to his legal rights. *Secondly* he must have spent some money or must have done some act on the faith of his mistaken belief. *Thirdly* the true owner must know the existence of his legal right which is inconsistent with the right claimed by person incurring expenditure. *Fourthly* the true owner must know of the mistaken belief of the person incurring expenditure. *Lastly* the true owner must have encouraged the person incurring expenditure in his expenditure or in other acts which he has done, either directly or by abstaining from asserting his legal right. (*Skemp, J.*) MAPAL *v.* RANA. **I.L.R. (1938) Lah. 296=177 I.C. 198=11 R.L. 277=41 P.L.R. 51=A.I.R. 1938 Lah. 88.**

——S. 115—*Acquiescence—Person present at adoption and acquiescing in same—Absence of representation leading to adoption—Right to challenge adoption—Estoppel—Mistake of law—Effect of.*

A mere presence at an adoption or a mere acquiescence in an adoption does not create an estoppel, so as to preclude the person present or acquiescing from challenging the adoption afterwards, when there is no representation made as to any matter of fact on the strength of which the act of adoption can be said to be made and especially when the parties are labouring under a mistake of law. (*Broomfield and Wassoodew, JJ.*) RAMACHANDRA NARAYAN *v.* MURLIDHAR YESHWANT. **173 I.C. 36=10 R.B. 305=39 Bom.L.R. 599=A.I.R. 1938 Bom. 20.**

——S. 115—*Acquiescence — Silence, when amounts to.*

Silence may amount to acquiescence if it is an omission to act according to the circumstances of a particular case. Where a site is sold with a condition attached that it should not be used as a shop, but it is allowed to be used as a shop by the first vendee and his successors and the shop is even re-built without any objection being raised by the vendor, the latter is estopped from raising the objection subsequently. (*Dalip Singh, J.*) SECRETARY OF STATE *v.* DINA NATH. **42 P.L.R. 133.**

——S. 115—*Acquiescence*—Ultra vires *statute —How affected.*

An *ultra vires* statute cannot be validated by acquiescence, but an acquiescing party may be estopped from questioning it. (*Gruer and Niyogi, JJ.*) MADHOO GOPAL *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag. 143=180 I.C. 532=11 R.**

EVIDENCE ACT (1872), S. 115.

N. 370=1938 N.L.J. 439=A.I.R. 1939 Nag. 44.

——S. 115—*Acquiescence—What constitutes.*

To constitute acquiescence there must be something equivalent to what is termed in legal parlance as "standing". There is a distinction between acquiescence and mere quiescence. (*Norman.*) FATIMA *v.* NATHU. **1936 A.M.L.J. 81.**

——S. 115—*Admissions—Estoppel.*

A person is not estopped or concluded by the admissions made by him unless another person has been induced by them to alter his position to his detriment. 34 I.A. 27 (35), Rel. on. (*Nanavutty, J.*) MOHAMMAD ABDUL HASEEB *v.* ZIA UDDIN AHMAD. **1937 O.W.N. 423.**

——S. 115—*Admission—Inference from conduct—Value of.*

An admission inferred from conduct does neither amount to an estoppel nor is a conclusive proof of the matter admitted, but it is certainly a strong *prima facie* evidence and may be conclusive when not rebutted by any evidence. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) KUSHALSINGH *v.* UTTAMSINGH. **1939 M.L.R. 229 (Civ.).**

——S. 115—*Admissions in written statement in former suit regarding title of co-defendant—When operates as estoppel.*

Where a defendant in his written statement in a former suit makes admissions regarding the title of a co-defendant in that suit, those admissions do not operate as estoppel in the absence of proof that the co-defendant owing to the written statement acted in any way in which he would not have acted if the written statement had not been filed. (*Wright, J.*) MA TO *v.* MAUNG E BYU. **A.I.R. 1940 Rang. 136.**

——S. 115—*Admission to co-tenancy in occupancy holding—Defect in procedure—Denial of status as co-tenants—Estoppel.*

Where an occupancy tenant agrees to admit others as his co-tenants in the holding but the agreement is not registered as required by law, the defect in the procedure may or may not vitiate the status of those other persons *vis a vis* the Zamindar, but inasmuch as the occupancy tenant induced those other persons to do certain acts, which they would not otherwise have done, by giving his consent to their admission as co-tenants he is fully estopped from denying their status as his co-tenants. (*Harper, S. M. and Sathe, J.M.*) SHEO NARAIN *v.* PHUL SRI. **1940 R.D. 224=1940 A.W.R. (B.R.) 85.**

——S. 115—*Applicability—Different allegations as to nature of same mortgage.*

Where in a suit a party alleges that a mortgage was a simple one and in subsequent suit the same party says that the mortgage was a usufructuary mortgage and the opposite party on the other hand pleads in previous suit that the mortgage was a usufructuary mortgage and subsequently thinks that it was a simple one, the parties cannot be tied down by any rule of estoppel. In precise terms, S. 115, Evidence Act, would not apply. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. **I.L.R. (1938) All. 714=1938 O.W.N. 642=1938 A.W.R. (H.C.) 408=176 I.C. 492=1938 A.L.J. 746=11 R.A. 110=1938 A.L.R. 634=A.I.R. 1938 All. 418 (F.B.).**

EVIDENCE ACT (1872), S. 115.

——S. 115—*Applicability—Representation not as to existing fact but one* de futuro—*If gives rise to estoppel.*

In order that there may be an estoppel within the scope of S. 115 of the Evidence Act, there must be some representation as to existing fact. There cannot be any estoppel in respect of a representation not as to an existing fact but one *de futuro.* (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **39 Bom.L.R. 1257=174 I.C. 67=10 R.B. 420=A.I.R. 1938 Bom. 148.**

——S. 115—*Applicability—Representation on question of fact—Effect—Raiyat falsely representing himself as tenure-holder and settling person as raiyat on land—Latter believing that he is getting permanent rights—Suit for ejectment as under-raiyat—Estoppel—Lease void under Chota Nagpur Tenancy Act—Estoppel against statute—Applicability of principle.*

Plaintiffs representing themselves as tenure-holders inducted the defendant on the land in suit and made a *raiyati* settlement with him. The defendant was induced to believe that he was getting a permanent right in the land and the defendant paid a *salami* of Rs. 140 to the plaintiffs. The plaintiffs were recorded in the record-of-rights as *raiyats* and the defendant as a *darraiyat.* The plaintiff brought a suit to eject the defendant from the land alleging that he was an under-raiyat of the plaintiffs and that he did not vacate the land in spite of a notice to quit. The defendant pleaded estoppel, but the plaintiffs contended that the lease was void under S. 46 of the Chota Nagpur Tenancy Act, and that there could be no estoppel against a statute,

Held, the doctrine of estoppel operated and that the plaintiffs having represented themselves as tenure-holders could not be permitted to enter into a discussion of the question of fact as to whether they were or were not tenure-holders, but must be held bound by their own representation. Since the plaintiffs were prevented from proving the fact that they were really not tenure-holders but only raiyats, no question of the principle that there cannot be an estoppel against a statute can arise. There would be no estoppel if there had been any collusion between the plaintiffs and defendant, and if it had been proved that the former had deliberately misrepresented themselves to be tenure-holders to the knowledge of the latter to defeat the provisions of the Chota Nagpur Tenancy Act. (*Courtney-Terrell, C.J., Macpherson and Fazl Ali, JJ.*) DHANU PATHAK *v.* SONA KOERI. **15 Pat. 589=162 I.C. 177=8 R.P. 511=17 Pat.L.T. 380=1936 P.W.N. 339=A.I.R. 1936 Pat. 417 (S.B.).**

——S. 115—*Approbate and reprobate—Person with full knowledge admitting waqf nature of house—If can resile from that position.*

A party cannot be allowed to approbate and reprobate. Where a person with full knowledge of the facts in unmistakable terms admitted the waqf nature of a house he cannot subsequently be allowed to resile from the position. A.I.R. 1938 Lah. 686, Foll. (*Addison and Ram Lall, JJ.*) MT. BIBI KUNDO *v.* ONKAR NATH. **183 I.C. 645=12 R.L. 126=41 P.L.R. 342=A.I.R. 1939 Lah. 63.**

——S. 115—*Attestation—Effect of.*

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. Of course, there may be cases in which attestation is made in circumstances when coupled with other evidence of consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. (*Rowland, J.*) JASODAR DUSADHIN *v.* MT. SUKURMANI. **1937 P. W.N. 144=170 I.C. 1005=10 R.P. 185=4 B.R. 5=A.I.R. 1937 Pat. 353.**

——S. 115—*Attestation—Effect of—No notice of contents.*

No estoppel results from the signing of a document by a person as an attesting witness. It does not establish that he was aware of its contents and was a consenting party to the transactions embodied in them. The burden of proving that he had such knowledge and was a consenting party to the transactions lies upon the parties who so assert. (*Agha Haidar, J.*) SIRAJ UDDIN *v.* MST. RAHIMAN. **165 I.C. 997=9 R.N. 325=38 P.L.R. 416=A.I.R. 1936 Lah. 978.**

——S. 115—*Attestation—When amounts to estoppel.*

When a person having title to property attests a mortgage bond in respect of that property executed by another describing the same as the mortgagor's self-acquired property with full knowledge of the contents of and the recitals in the deed of mortgage, he in effect gives an assurance to the mortgagee that the property mortgaged is really the self-acquired property of the mortgagor and that he, the attestor, claimed no interest in it. It is no more than merely standing by; he in effect allows the mortgagee to part with his money and by his conduct impliedly represents that whatever title the mortgagor may have he has his (attestor's) authority to mortgage the property, and attests the deed on that basis. The attestor cannot subsequently turn round and say that mortgagor had no title and that he himself has rights in the property. The doctrine of estoppel operates against him and prevents him from setting up his title against the mortgagee. (*Courtney-Terrell, C.J. and Dhavle, J.*) JANKIRAM SITAL RAM *v.* THE CHOTA NAGPUR BANKING ASSOCIATION, LTD. **15 Pat. 721=165 I.C. 98=9 R.P. 150=1936 P.W.N. 738=3 B.R. 8=17 Pat. L.T. 697=A.I.R. 1937 Pat. 169.**

——S. 115—*Conduct—A holding two mortgages on same property—Decree on second mortgage obtained by A disclosing prior mortgage—Mortgagor privately selling property without A's knowledge free of incumbrances—Decretal amount deposited in Court—A, if estopped from suing on prior mortgage.*

A held two mortgages against the same property. He obtained a decree for the sale of mortgaged property in a suit brought on the second mortgage. Therein he clearly disclosed the existence of a prior mortgage. In the meantime the mortgagor sold the property to *B* privately and free from incumbrances and the decretal amount was deposited in Court.

Held, that as *A* had disclosed the existence of prior mortgage and as he did not know that the property was sold privately to *B* free from incumbrances, he was not estopped from suing on the prior mortgage. (*Addison and Abdul Rashid, JJ.*) MT. FAZAL NISHAN *v.* HUKAM SINGH. **167 I.C. 15=9 R.L. 482=A.I.R. 1936 Lah. 1020.**

——S. 115—*Conduct—Charge-holder putting up property to sale in execution—Charge mentioned in application for execution but omitted in sale proclamation—Estoppel.*

If a person holding charge has deliberately waived his right in respect of the charge and put the property up to sale free of the charge and without disclosing it, there is no doubt that he would be estopped by his own conduct from pleading a charge at any subsequent time. But where the charge-holder in the application for execution has clearly mentioned that the property was charged and the charge is not mentioned in the sale proclamation owing more to an omission on the part of some officer of the Court than to any deliberate omission on the part of the charge-holder, he would not be estopped by his own conduct from setting up the charge subsequently. In any event even if it be assumed that the omission to mention the charge in the sale proclamation was due to the negligence of the charge-holder, the auction-purchaser would not be in a position to take advantage of this fact if it could be shown that he had notice of the charge. (*Edgley, J.*) JNANENDRA NATH *v.* SASHI MUKHI. **188 I.C. 833=12 R.C. 528=44 C.W.N. 240=A. I.R. 1940 Cal. 60.**

——S. 115—*Conduct—Consent to act done by another which could not otherwise lawfully be done without such consent—Inducement to another to do act which otherwise he would have abstained from—Effect—Implied representation—Estoppel—Applicability of doctrine.*

If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which, they otherwise might have abstained from, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. The doctrines of estoppel, which is found in all civilised nations, applies in such a case. Whether the case is based on a contract not to raise disputes or on estoppel, the doctrine is equally operative against the person who so induces others to act on the faith of his express or implied representations. (*Courtney-Terrell, C. J. and Dhavle, J.*) JANKIRAM SITAL RAM *v.* THE CHOTA NAGPUR BANKING ASSOCIATION, LTD. **15 Pat. 721=165 I.C. 98=9 R.P. 150=17 Pat.L.T. 697=1936 P.W.N. 738=3 B.R. 8=A.I.R. 1937 Pat. 169.**

——S. 115—*Conduct—Co-sharer tenant not impleaded in landlord's suit for rent, participating in compromise to set aside sale—If estopped from impugning character of landlord's decree as rent decree—B. T. Act.*

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A co-sharer tenant who is not impleaded in the suit for rent by the landlord and who during the execution proceedings voluntarily comes forward and offers himself as a party to a compromise the sole object of which is to have the sale of the tenure set aside, does not thereby recognise the decree obtained by the landlord as a rent decree, and he is accordingly not estopped from subsequently disputing its character as such, particularly when he has not been made a party to the appeal filed by the auction-purchaser against the order setting aside the sale on the basis of the compromise. (*Khundkar, J.*) NARENDRA NATH ACHARJEE *v.* HIRENDRA NATH ACHARJEE. **I.L.R. (1938) 2 Cal. 266 =182 I.C. 217=12 R.C. 18=42 C.W.N. 701 =A.I.R. 1938 Cal. 500.**

———**S. 115**—*Conduct—Dispute between co-operative Society and its member referred to arbitration under Society's bye-law—Bye-law making award final and not open to appeal—Society, if can challenge validity of bye-law and claim right of appeal.*

Where a dispute between a Co-operative Society and one of its members is referred to arbitration expressly under a bye-law framed by the Society itself which makes the award of the arbitrators final and not open to appeal, the bye-law must be taken to govern the contract and be treated as though it were one of the conditions of the contarct. There is nothing illegal in the parties agreeing that there shall be no right of appeal in a particular case. The consideration for such an agreement on the part of either party is the agreement of the opposite party to forego its rights of appeal. When the Society has thus given up its right of appeal and the opposite party has acted upon that basis, the Society cannot be allowed to challenge the validity of its bye-law and claim a right of appeal. (*Coldstream and Bhide, JJ.*) MODEL TOWN CO-OPERATIVE SOCIETY, LTD., LAHORE *v.* ABDUL ASAR HAFIZ JULLUNDARI. **168 I.C. 483=9 R.L. 638=39 P.L.R. 460=A.I.R. 1937 Lah. 673.**

———**S. 115**—*Conduct—Encroachment of land by erection of building—Owner failing to raise objection—Estoppel.*

A person is not justified in keeping silent when he is aware that another person has encroached upon his land and is erecting a costly building. He will be estopped by his conduct from claiming possession of the area encroached upon by demolition of the construction erected thereon. (*Bhide, J.*) MUL RAJ *v.* JANESWAR LAL **184 I.C. 826=12 R.L. 259=41 P.L.R. 573=A.I.R. 1939 Lah. 502.**

———**S. 115**—Conduct—Execution—Claim to interest based on alleged agreement by judgment-debtor to pay same—Decree silent as to interest—Denial of agreement by judgment-debtor—Latter, if estopped from denying liability for interest. *See* EXECUTION—EXECUTING COURT. **71 M.L.J. 747.**

———**S. 115**—*Conduct—Father purchasing and recording property in son's name—If estopped from pleading that property was not his son's.*

Where the conduct of a father was the acquisition and the recording of the property in the name of his son and the party pleading estoppel knew or would, on inquiries, have known that the property was acquired by the father out of his own money and that the son was never in a position to acquire such property.

Held, that the father was not estopped from pleading that the property in the suit was not the property of his son. (*Pollock, J.*) GOPAL TRIMBAK *v.* KESHEOSA VISHNOOSA. **I.L.R. (1936) Nag. 65=165 I.C. 350=9 R.N. 80=A.I.R. 1936 Nag. 185.**

———**S. 115**—*Conduct — Mortgaged property standing in name of mortgagor—Mother of mortgagor present at time of negotiations finally inducing mortgagee to advance money—Mother, if estopped from denying title of son to property—T. P. Act, S. 41.*

A mortgaged certain property to *B*. The property stood all along in the name of *A* who was considered to be its owner, did all the acts as an owner would do, and gave to *B* the extracts from the Municipal registers and a copy of the survey plan before the mortgage showing that he was the owner. His mother was present at the negotiations, when the mortgage in question was executed, and it was she who finally induced *B* to advance money on the mortgage, at the same time giving her brother as surety. Subsequently she brought a suit to avoid the transfer.

Held, that she was estopped from denying the fact that the property belonged to her son *A*.

Held also, the mortgagee took reasonable care to ascertain that the transferor had power to make the transfer. It was with the express consent of the mother that her son *A* was held out as the ostensible owner and in that capacity he transferred an interest in the suit property to *B* for valuable consideration and hence the proviso to S. 41, T.P.Act, had been complied with and the transfer could not be avoided. (*Addison and Din Mohammad, JJ.*) MST. LACHHMI DEVI *v.* UTTAM CHAND KAPUR & SONS. **174 I.C. 299=10 R.L. 549=A.I.R. 1937 Lah. 272.**

———**S. 115**—*Conduct—Omission to speak—When furnishes basis for estoppel—Representation and omission—Distinction—Connection between representation and course of conduct—Absence of—Effect.*

Where both parties are under a mistaken impression as to their respective rights, and each acts under his or her impression, if one of the parties asks the Court to believe that any conduct or omission on the part of the other misled the former party into adopting a particular course of action, it is necessary for the Court to scrutinize the connection between the representation and the course of conduct alleged to have been pursued as a result thereof. When there is an utter absence of evidence of these requirements of estoppel, no inference of estoppel can be drawn from the mere omission of a party to speak. The law of estoppel draws a distinction between representations and omissions, and omission to speak will furnish a basis for estoppel only when the circumstances are such as to throw upon the party sought to be bound by estoppel the duty to speak out the truth. (*Varadachariar and Horwill, JJ.*) NARAYAN NAMBI *v.* SANKARAN NAMBI. **168 I.C. 842=9 R.M. 649=1937 M.W.N. 82=44 L.W. 859=A.I.R. 1937 Mad. 158.**

———S. 115—*Conduct—Tenancy passing by successions and transfers as permanent tenancy—No objection raised by landlord—Estoppel.*

Where the plaintiffs and their ancestors had been receiving rent at a fixed rate from the defendant and his predecessors-in-interest continuously for a period of over 76 years, and during that period the tenancy had passed to various persons by successions and transfers in some of which the vendors described themselves as permanent tenants, and no objection was raised by the plaintiffs or their predecessors-in-interest to any of them.

Held, that the plaintiffs by their acts and conduct were estopped from denying the permanent nature of the tenancy. (*Tek Chand and Dalip Singh, JJ.*) MT. NAZIR-UL-NISA *v.* MAHOMED ISHAQ. **I.L.R. (1940) Lah. 352=188 I.C. 372=12 R.L. 522=42 P.L.R. 61=A.I.R. 1940 Lah. 100.**

———S. 115—*Erroneous statement by Counsel—Client if estopped.*

An erroneous statement made by counsel in the course of argument cannot estop the client from taking the correct legal position afterwards. (*Bhide, J.*) ALLAHABAD BANK, LTD. *v.* PUNJAB NATIONAL BANK. **42 P.L.R. 249=A.I.R. 1939 Lah. 303.**

———S. 115—*Estoppel — None if truth known.*

S. 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. (*Din Mohammod, J.*) LORIND CHAND *v.* PUNJAB NATIONAL BANK, LTD. **A.I.R. 1940 Lah. 254.**

———S. 115—*Estoppel against statute—Compromise in contravention of law—If can operate as estoppel.*

A compromise entered into in contravention of the provisions of law cannot operate by way of estoppel as there can be no estoppel as against a statute. (*Drake Brockman, S.M.*) HAR PERSHAD *v.* SAVANT. **1936 R.D. 565.**

———S. 115—*Estoppel against statute—Mortgage of raiyati lands in contravention of S. 47, Chota Nagpur Tenancy Act—Sale in execution of decree on mortgage—Objection by mortgagor—Admission in mortgage as to mortgage covering such lands—If operates as estoppel.*

It is perfectly true that in normal circumstances a mortgagor is bound by his deed and is estopped from contending that the area which he has stated as being his to mortgage, is in fact not his to mortgage. But there can be no estoppel against the terms of a statute. The proposition of law that a grantor cannot be heard to assert facts in derogation of his grant is a sound rule, but it cannot prevail against the express terms of a statute which prohibits the transfer. *K* who held an *ijara* right under an estate mortgaged it to the respondent. As *ijardar* he had *khas* lands in the *mauza*. By a further agreement it was stipulated that the mortgaged property included not merely the *ijara* rights, but also his rights as *ijardar* in the *khas* lands. The *khas* lands included certain areas which were in fact the *raiyati* holding of *K* under the superior landlord. The respondent obtained a decree on his mortgage and sought to enforce the mortgage by sale. *K* objected to the sale on the ground that under S. 47 of the Chota Nagpur Tenancy Act, the *raiyati* lands could not be sold in execution of any decree. The respondent pleaded in answer that *K* was estopped from setting up S. 47 in bar of the sale as he was bound by the admissions in the mortgage deed and in the agreement.

Held, that in the face of the express provision in S. 47 of the Chota Nagpur Tenancy Act, that *raiyati* lands cannot be sold in execution of a decree, the mortgagor *K* was not estopped by reason of his admissions in the deed from setting up S. 47, as there could be no estoppel against a statute. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MANU MANDAL *v.* JUGAL KISHORE MARWARI. **18 Pat.L.T. 430.**

———S. 115—*Estoppel against statute—Statute imposing duty—Plea of estoppel—If can avail.*

In case of a statute enacted for the benefit of a section of the public, that is, on grounds of public policy, where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the party suing seeks to do, it is not open to the opposite party to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the party suing from an obligation to obey such a statute, nor can it enable the opposite party to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey law. (*Lord Maugham.*) MARITIME ELECTRIC CO., LTD. *v.* GENERAL DAIRIES, LTD. **168 I.C. 616=9 R.P.C. 299=1937 M.W.N. 663=46 L.W. 105=A.I.R. 1937 P.C. 114 (P.C.).**

———S. 115—*Estoppel by record — Judgment creating charge on property*—Bona fide *purchaser for value without notice—If bound by charge.*

A judgment not only creates a right, it works an estoppel. A judgment creating a charge on immovable property binds not only the parties to the suit but also their privies. The term "privy" is a term of the law meaning a partaker who is not a party, that is, in this connection, it includes all who derive title to the land, the subject of the charge from one who was a party to the suit by the decree in which the land was charged. It follows, therefore, that the charge is effective against a *bona fide* purchaser of the land for value without notice by reason of the law of estoppel by record. (*Stone, C. J. and Digby, J.*) AHSAN HUSSAIN *v.* MAINA. **I.L.R. (1938) Nag. 431=10 R.N. 264=172 I.C. 949=A.I.R. 1938 Nag. 129.**

———S. 115—*Inconsistent pleas—Plea in execution that proper remedy was by suit—Plea in subsequent suit that it was barred under S. 47, C. P. Code—Estoppel.*

The law does not permit a party where the question is one of procedure to urge that one form of procedure should be followed and when he has successfully maintained this and the pro-

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cedure which he urged should be followed has been followed to urge that the new procedure is wrong and the old procedure was right. Consequently, a party who has successfully maintained in execution proceedings that the proper remedy of the opposite party was by way of a suit, cannot be heard, when the suit is brought, to contend that the proper remedy was by way of execution and that the suit was barred by S. 47, C.P.Code. (*Dalip Singh, J.*) TEGU MAL *v.* MOTI LAL. **181 I.C. 501=11 R.L. 853=40 P.L.R. 243=A.I.R. 1938 Lah. 525.**

———S. 115—*Landlord and tenant—Conduct—Admission—Sufficiency to attract operation of section.*

Where after a decree for ejectment, the defendant gives a notice to the plaintiff that he would give up possession on a particular day but actually did not do so at all, and it did not contain any admission that he was a sub-tenant only, the failure of the defendant to keep his promise to give up possession cannot possibly operate as an estoppel. Where all that can be said is that a person has not formally contested the ejectment suit, that is neither a declaration an act or an admission within the meaning of S. 115 of the Evidence Act. (*Bomford, S.M.*) TOTA RAM *v.* RAM PRASAD. **1939 R.D. 135=1939 A.W.R. (B.R.) 149.**

———S. 115—*Landlord and tenant—Suit for ejectment by landlord against tenant acting in collusion with tenant—Tenant admitting claim and allowing decree to be passed*—Thekadar *really in possession—Execution of decree—Objection by tenant on ground of decree being nullity—If open—Estoppel.*

A landlord who was out of possession, the *thekadars* being in possession, colluded with the tenants and filed ejectment suits against the tenants in order to create evidence of his possession. The tenants admitted the claim and decrees for ejectment were passed.

Held, that the tenants were bound by the admission, and could not object to the execution of the decrees on the ground that the decree were nullities. It is not open to an execution Court to decline to execute the decrees when the defendants had admitted the claim, though they afterwards want to go behind the same. (*Drake Brockman, S.M. and Knox, J.M.*) SRI THAKUR BALAJI *v.* SHEO NATH. **1936 R.D. 541.**

———S. 115—Minor—Fraudulent misrepresentation as to age—Right to plead minority—Estoppel—Avoidance of contract—Duty to make restitution. *See* CONTRACT—MINOR. **A.I.R. 1936 Cal. 567.**

———S. 115—*Mistake—Failure to recover tax by municipality owing to mistake—Recovery later on—Plea of estoppel in defence.*

Where a municipality owing to some mistake failed to recover a particular tax, it cannot be pleaded that they are estopped from recovering it, when they later on make attempts to collect it. The plea cannot enable a defendant to escape from a statutory obligation. (*Gruer, J.*) KAMRUDDIN *v.* THE MUNICIPAL COMMITTEE, KHANDWA. **183 I.C. 443=12 R.N. 61=1939 N.L.J. 265=A.I.R. 1939 Nag. 195.**

———S. 115—*Mistake—Person wrongly describing himself as executor—Estoppel.*

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Where a person who has not been appointed executor of a will either expressly or by implication, describes himself as an executor under a mistake about his legal position, this would not make him an executor or raise an estoppel against him. (*Mr. Jayakar.*) ATISUKHLAL *v.* NATVARLAL. **I.L.R. (1939) Kar. (P.C.) 391=6 B.R. 26=183 I.C. 885=12 R.P.C. 78=1939 O.L.R. 586=A.I.R. 1939 P.C. 238 (P.C.).**

———S. 115—*Mortgagor and mortgagee—Rule of estoppel between—Applicability to suit in repudiation of mortgage.*

In a suit by the plaintiff to recover possession of a certain property from the defendant on the ground that the mortgage in respect of that property made by her mother during her minority in favour of the defendant is not binding on her, the defendant is not estopped from disputing the title of the plaintiff although he has obtained the deed of mortgage from her mother on the footing that the plaintiff is the owner of the property. The rule of estoppel between the mortgagor and the mortgagee does not apply to a case where the suit is not based on the mortgage but is one in repudiation of the mortgage. (*Srivastava, Ag. C.J. and Smith, J.*) RAJANA *v.* MUSAHEB ALI. **13 Luck. 178=167 I.C. 79 =9 R.O. 367=1937 O.L.R. 95=1937 O.W.N. 237=A.I.R. 1937 Oudh 431.**

———S. 115—*None against statute.*

There can be no estoppel against an act of the legislature. When therefore the legislature has declared that no adoption would be valid without a registered adoption deed, the plaintiff is not estopped by her conduct from disputing the validity of the defendants' adoption for want of a registered deed. (*Ranjitmal and Sukhdeonarain, JJ.*) FOJMAL *v.* MST. SINGARI. **1939 M.L.R. 60 (C.).**

———S. 115—None against statute and statutory rights. *See* BENGAL LAND REVENUE SETTLEMENT REGULATION AND REGULATION IX OF 1825. **40 C.W.N. 341.**

———S. 115—*None against statute—Applicability of rule—Deed void in part—Clause in contravention of statute—Estoppel—If can arise from part which is good.*

There can be no estoppel against the statute; it is therefore permissible for a party to a deed to say that he is not bound by a term in the deed which is in contravention of the statute. When that term is separable from the rest, the deed is void in part only, the rest being severable, and estoppels may arise from the part which is good. This provides an exception to the general rule that where a deed has been executed in contravention of a statute, the law of estoppel does not apply. (*D. N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDHURI *v.* SECRETARY OF STATE FOR INDIA. **63 C.L.J. 52 =A.I.R. 1936 Cal. 774.**

———S. 115—*None if truth known—Person incurring expenditure over building knowing that it does not belong to him—Whether can raise plea of estoppel against owner.*

In order to bind a person by estoppel, it must be shown that the person incurring the expenditure did so under a *bona fide* belief that he was entitled to the building over which he was incurring the expenditure. If he knew that it did not belong to him but belonged to another

but chose of his own accord to incur expenditure by repairing that building, he cannot raise against the owner any plea of estoppel based upon his own conduct. (*Nanavutty and Zia-ul-Hasan, JJ.*) ZAKIA BEGAM *v.* THE LUCKNOW IMPROVEMENT TRUST. **13 Luck. 192=167 I.C. 414=9 R.O. 382=1937 O.W.N. 252=1937 O. L.R. 115=A.I.R. 1937 Oudh 263.**

———**S. 115**—*Question of law.*

There can be no estoppel on a statement of law relating to the validity of nomination of a person as a chela under the terms of a will. (*Mr. Jayakar.*) KARTAR SINGH *v.* DAYAL DAS. **I.L.R. (1939) Kar. 350=42 Bom.L.R. 1=5 B.R. 868=12 R.P.C. 23=1939 A.L.J. 809=182 I.C. 753=1939 O.L.R. 439=1939 O.W.N. 634=43 C.W.N. 1037=1939 A.W.R. (P.C.) 106=A.I.R. 1939 P.C. 201 (P.C.).**

———**S. 115**—Representation—Act or omission, when amounts to—Landlord and tenant. *See* LANDLORD AND TENANT—PERMANENT TENANCY. **A.I.R. 1939 Pat. 296.**

———**S. 115**—Representation — Agreement by Hindu reversioner giving up reversionary rights and not to claim them in future—Validity—If operates as estoppel. *See* HINDU LAW—FAMILY ARRANGEMENT. **A.I.R. 1937 Pat. 280.**

———**S. 115**—Representation—Agreement by parties to suit to abide by statement of third person—Statement by third person—Binding nature of—Right to challenge—Estoppel. *See* C. P. CODE, O. 23, R. 3. **1937 A.W.R. 801=A.I.R. 1937 All. 701.**

———**S. 115**—Representation—Allotment of shares at partition—Parties executing relinquishment deeds—Subsequent claim to succeed as reversioner to shares allotted to others—Estoppel. *See* HINDU LAW—PARTITION. **1936 A.W.R. 93.**

———**S. 115**—*Representation—C taking oral lease of land from* A *and erecting house thereon*—B *purchasing house after obtaining from* A *order permitting him to do so—Suit by* A *for ejecting* B—*Estoppel.*

C took an oral lease of certain land belonging to *A* and erected a house thereon. *B* purchased the said house from *C* and at the time of the purchase got an order from *A* permitting him to purchase the house from *C*. *A* subsequently brought a suit to eject *B*, having served him with notice to quit.

Held, that *A* was not in any way estopped from saying that he was entitled to eject *B* on one month's notice. The actions of *B* and *C* were referable to the verbal contract whatever that may have been. The order given by *A* was merely a permission to purchase the interest of *C* and was not dissimilar to licence to sublet where there is a covenant not to sublet or assign. A.I.R. 1925 P.C. 146, Dist. (*Wort, J.*) MUNSHI MAHTON *v.* JUGESWARI PRASAD SINGH. **161 I.C. 514=8 R.P. 456=A.I.R. 1936 Pat. 133.**

———**S. 115**—Representation—Carriage of goods by Railway—Declaration of value by consignor—Fixing of rate of carriage on basis of declaration—Loss of goods—Plea that value declared not true value—If available—Estoppel. *See* RAILWAYS ACT, S. 75 (1) AND (2). **17 Pat.L.T. 268.**

———**S. 115**—*Representation—Change of position.*

One essential element of estoppel is that the party raising the estoppel actually altered his position to his detriment on the faith of the original representation. (*Skemp, J.*) ABDULLA *v.* MEHARBAN. **41 P.L.R. 414=A.I.R. 1939 Lah. 538.**

———**S. 115**—Representation—Government land—Assessment of revenue—Non-enhancement for long time—If operates as estoppel against Government in regard to enhancement. *See* BERAR LAND REVENUE CODE, Ss. 49 AND 83 (1). **20 N. L.J. 209.**

———**S. 115**—Representation—Hindu joint family—Unauthorised sale by son during temporary absence of father—Subsequent return of father and consent to mutation in favour of alienee—Effect—Father, if estopped from challenging sale. *See* HINDU LAW—ALIENATION. **16 Mys. L.J. 32 42 Mys.H.C.R. 669.**

———**S. 115**—Representation—Hindu widow—Adoption by under will of husband—No representation of oral authority—Will construed as not conferring authority to adopt—Widow if estopped from impeaching adoption. *See* HINDU LAW—ADOPTION. **48 L.W. 908.**

———**S. 115**—Representation—Mortgagee parting with title deeds knowing that they were required for effecting a sale—Estoppel against mortgagee in favour of purchaser—If arises. *See* T. P. ACT, S. 78. **A.I.R. 1937 Mad. 195.**

———**S. 115**—*Representation — Mortgage of holding by tenure-holder—Decree obtained by mortgagee—Execution by sale of holding—Plea of non-transferability of tenure—If open in execution.*

It is not open to a tenure-holder judgment-debtor, who has obtained advancees on mortgages of his holding on the representation that he was in enjoyment of a transferable interest in land, to object to a sale of his holding in execution on the ground that his interest is one which is not transferable. The landlord may be entitled to object to the transfer; but the tenant cannot in execution prevent the sale of his own right, title and interest by putting forward the plea that the landlord's consent would be required to complete the title of the purchaser. That is a matter between the purchaser and the landlord. (*Courtney Terrell, C.J. and James, J.*) SOMAR RAM *v.* BUDHU RAM. **19 Pat.L.T. 421=175 I.C. 482=1938 P. W.N. 457=4 B.R. 586=10 R.P. 630=A.I. R. 1938 Pat. 431.**

———**S. 115**—Representation—Oral agreement of permanent lease by Mohunt of Thakur—Tenant paying Salami and building pucca structure—Tenant not getting agreement specifically enforced or taking registered lease—Suit to eject by succeeding Mohunt—Estoppel. *See* T.P. ACT, S. 107. **1938 P.W.N. 386.**

———**S. 115**—*Representation—Plea of estoppel—Fraud, if necessary.*

It is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. (*Bhide, J.*) ABDULLAH SHAH *v.* MAHOMED YAQUB. **40 P.L.R. 848=178 I.C. 436=11 R.L. 458=A.I.R. 1938 Lah. 558.**

———**S. 115**—*Representation—Plot let out by Government for building purposes without fixing term—Government advancing loan for building on*

mortgage of plot—Implied representation of perpetual tenancy—If arises.

If a Court of Equity is to enforce a title to land against the person who at law is the owner thereof, the title must nevertheless be based either upon contract, express or implied, or upon some statement of fact grounding as estoppel. A certain plot was settled and leased out by Government for building purposes. The lease was apparently for no fixed term. There was no legal usage or custom by which persons acquiring homestead land had permanent right therein. The lessee obtained a loan from the Government for the purpose of building on the land and executed a mortgage of the land.

Held, that the mortgage advance was neither an implied representation founding an estoppel nor a circumstance sufficient to justify the legal inference that Government had by plain implication contracted that right of tenancy should become a perpetual right of occupation. (*Wort and Dhavle, JJ.*) SECRETARY OF STATE *v.* SARAT CHANDRA SEN GUPTA. **171 I.C. 461=10 R.P. 213=4 B.R. 33=A.I.R. 1937 Pat. 399.**

———**S. 115**—*Representation — Representation of intention—If can be basis of estoppel.*

The doctrine of estoppel has its foundation on representation of facts being made. A mere representation of an intention cannot be the basis of estoppel. A promise made is not a representation of a fact. (*Guha and R.C. Mitter, JJ.*) BIBHUTI BHUSAN PAL CHAUDHURY *v.* MAYA DEBY. **174 I.C. 790=10 R.C. 721=65 C.L.J. 590=A.I.R. 1938 Cal. 172.**

———**S. 115**—*Representation—Statement of existing fact—If essential—Mere promise to do something in future—If gives rise to estoppel.*

The doctrine of estoppel is a simple one and in its essence is just a rule of evidence. If a person makes a representation of fact and induces another to believe it and to act on it, the law prevents the former from denying the truth of his statement. As between the parties, the statement has to be accepted as a correct representation of what it says, but for this there must be a statement, and a statement of fact, not a mere promise to do something in the future. Where a statement is a mere promise to do a certain act in consideration of something else, it may form a valid agreement if it can be proved, and if the law allows it, but it can certainly not be called a statement of the existing fact to bring in the operation of the doctrine of estoppel. (*Bose, J.*) TOTARAM JAWAHARLAL *v.* HARISCHANDRA HARKISAN. **174 I.C. 7=10 R.N. 342=A.I.R. 1937 Nag. 402.**

———**S. 115**—Representation—Suit by person in representative capacity—Defendant led to believe suit to be a representative suit—Plaintiff assuming that position and taking chance of decree—Subsequent denial of representative character—Estopped. *See* C.P. CODE, S. 11. EXPL. VI. **39 Bom.L.R. 130.**

———**S. 115**—*Representation—Suit by zemindar for declaration that one alone of two persons recorded as joint tenants is his statutory tenant—Both filing joint written statement that they were joint occupancy tenants--Subsequent suit by one of them against other that he alone is tenant—Estoppel.*

In a suit by a zamindar for a declaration that one alone of the two persons recorded as joint tenants was his statutory tenant in the plots in suit, both filed a joint written statement claiming to be joint occupancy tenants, and the suit was withdrawn. Subsequently one of them sued for a declaration against the other that he alone is the tenant.

Held, that there could be no estoppel unless one person by his declaration, act or omission had intentionally caused another person to believe a thing to be true and to act on that belief, and that as there was nothing to suggest that as a result of the written statement the defendant had done anything which he would not have done otherwise and as there had been no change in the relations of the parties, the plaintiff was not barred by estoppel from claiming that the holding was separate. (*Darling, S.M. and Bomford, J.M.*) JOKHU *v.* JOKHAN. **1937 R.D. 256.**

———**S. 115**—*Representation—When raises estoppel.*

No case of estoppel can be established by a party if it is not shown that any action of his was induced by any representation or conduct of the other party. (*Lord Normand.*) THE DISTRICT LOCAL BOARD, AHMEDABAD *v.* SERETARY OF STATE. **32 S.L.R. 340=1938 A.W.R. 115=10 R.P.C. 186=4 B.R. 295=172 I.C. 981=1938 O.A. 78=1938 O.L.R. 83=1938 O.W.N. 90=1938 All.L.R. 115=A.I.R. 1938 P.C. 87 (P.C.).**

———**S. 115**—*Representation—Whether can be of law.*

The expression "a thing" in S. 115 of the Evidence Act refers to a belief in a fact. The representation in order to work an estoppel must be a material statement of fact. The reason for this appears to be that every body is supposed to know the law or at least to have as much opportunity of knowing the law as another, so that a wrong belief on a point of law cannot strictly be said to be caused by a misrepresentation on the part of another. (*Zia-ul-Hasan, J.*) JAGAT NARAIN SINGH *v.* SALIK RAM SINGH. **173 I.C. 991=1938 O.W.N. 355=1938 O.L.R. 157=1938 O.A. 259=10 R.O. 246=A.I.R. 1938 Oudh 110.**

———**S. 115**—"*Representative*" — *Estoppel against judgment-debtor—If binds execution purchaser of judgment-debtor's property.*

If a man has once represented that another has a right to convey certain property, not only himself, but also his representatives are bound by those representations and they are effective to prevent any subsequent purchaser from him from asserting his title against the prior purchaser. A purchaser at an auction sale held by the Court in execution of a decree is a representative of the judgment-debtor and is bound by the estoppel against the judgment-debtor. The principle depends not merely on the particular character borne by the execution purchaser but on the view that one who can take advantage of an estoppel in his favour should be also bound by estoppel, though the purchaser is an innocent purchaser.

Dhavle, J.—Estoppels under S. 115 of the Evi-

dence Act are by the very terms of the section not confined to the parties, but extend to their representatives. (*Courtney Terrell, C.J. and Dhavle, J.*) JANKIRAM SITAL RAM *v.* THE CHOTA NAGPUR BANKING ASSOCIATION, LTD. **15 Pat. 721 =165 I.C. 98=9 R.P. 150=17 Pat..L.T. 697 =3 B.R. 8=1936 P.W.N. 738=A.I.R. 1937 Pat. 169.**

——S. 115—*Scope of.*

The law of estoppel which S. 115, Evidence Act, enacts is the same as the English law. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. **65 I.A. 75=I.L.R. 1938 Mad. 360=32 S.L.R. 313=1938 A.L. R. 100=1938 P.W.N. 152=19 Pat.L.T. 147=4 B.R. 260=47 L.W. 329=1938 A.L. J. 273=10 R.P.C. 169=1938 A.W.R. (P. C.) 90=66 C.L.J. 510=1938 O.A. 312=40 Bom.L.R. 713=1938 M.W.N. 552=172 I. C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)=1938 O.W.N. 206=A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).**

——S. 115—*Scope—English law.*

S. 115 represents or is the same as the law of estoppel in England. (*Wort, J.*) RAM LAL SAHU *v.* MT. BIBI ZOHRA. **5 B.R. 785=182 I.C. 618 =12 R.P. 30=A.I.R. 1939 Pat 296.**

——S. 115—*Scope—If exhaustive.*

Dhavle, J—Estoppels are not confined to S. 115 of the Evidence Act. (*Courtney Terrel, C.J. and Dhavle, J.*) JANAKIRAM SITAL RAM *v.* CHOIA NAGPUR BANKING ASSOCIATION, LTD. **15 Pat. 721 =165 I.C. 98=9 R.P. 156=17 Pat.L.T. 697 =3 B.R. 8=1936 P.W.N. 738=A.I.R. 1937 Pat. 169.**

——S. 115—*Silence—Encroachment on land—Omission to object—Estoppel.*

Where a person knowing that another person had encroached upon his land by erecting a costly building keeps silent and raises no objection to the encroachment he is estopped from bringing a suit for possession of land encroached upon by that person. (*Bhide, J.*) MOOL RAJ *v.* JANESHWAR LAL. **184 I.C. 826=12 R.L. 259=41 P.L.R. 573=A.I.R. 1939 Lah. 502.**

——S. 115—*Silence—Estoppel.*

Where there was no evidence of any detriment to the appellants as a consequence of the silence of the respondent or which had caused the appellants to alter their position in any way and there was no conduct amounting to a representation intended to induce a course of conduct on the part of the appellants.

Held, that there was no question of estoppel. (*Lord Maugham.*) IMPERIAL BANK OF CANADA *v.* MARY VICTORIA BEGLEY. **163 I.C. 295=9 R. P.C. 3=1936 M.W.N. 844=1936 A.L.J. 944 =1936 A.W.R. 937=44 L.W. 128=A.I.R. 1936 P.C. 193 (P.C.).**

——S. 115—Silence—When basis of estoppel. *See* EVIDENCE ACT, S. 115—CONDUCT. **A.I.R. 1937 Mad. 158.**

——S. 115—Statute—Estoppel against—Deed in contravention of law in part—Rule of estoppel —If can apply as regards part which is not illegal. *See* LEASE—FORFEITURE. **A.I.R. 1936 Cal. 774.**

——S. 116—*Applicability—Conditions—Lessee discovering want of title in lessor before commencement of lease—Acceptance of lease from real owner—If estopped from denying title of first lessor.*

Per Division Bench.—It is only so long as the tenancy is subsisting and the tenant is in possession, that a tenant cannot set up the title of a third person. Where, before the lease is to take effect, the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title. (*Varadachariar, Burn and Pandrang Row, JJ.*) ARUMUGHAM CHETTI *v.* SUBRAMANIAM CHETTI. **I.L.R. (1937) Mad. 638=171 I.C. 444=10 R.M. 340=46 L.W. 818=A.I.R. 1937 Mad. 882=(1937) 1 M.L.J. 679 (F.B.).**

——S. 116—*Applicability—Lessor losing possession after lease—Tenant made liable for rent to another—Denial of lessor's title—Estoppel.*

S. 116 of the Evidence Act only estops a tenant from pleading that at the time of leasing the land his lessor had no title; if the lessor loses possession and the tenant becomes liable to another for the rent, he is not estopped from disputing his lessor's claim. (*Drake Brockman, S.M. and Knox, J.M.*) PUTTI LAL *v.* LODHI. **1936 R.D. 384.**

——S. 116—*Applicability—Tenancy coming to an end.*

Once the tenancy is at an end there is nothing for S. 116 of the Evidence Act to fasten on to. When the tenancy is not continuing, the statutory estoppel comes to an end. (*Stone, C.J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **I.L. R. (1940) Nag. 269=182 I.C. 581=12 R.N. 12=1938 N.L.J. 317=A.I.R. 1938 Nag. 506.**

——S. 116—*Applicability—Tenant already in possession.*

Once a tenant admits the title of his landlord and acknowledges that he is the person to whom he shall pay the rent, S. 116 will apply and it does not make any difference whatsoever whether the landlord has put him into possession or whether the tenant has merely attorned to him. Of course it is open to every tenant to prove that he attorned under coercion or as a result of fraud, misrepresentation or mistake, but subject to this modification every tenant is estopped from denying the title of his landlord when with open eyes he has attorned to him and has admitted that he was entitled to receive the rent. (*Mir Ahmad, J.*) RAM DITTA MAL *v.* CHARAT SINGH. **177 I.C. 555= 11 R.Pesh. 29=A.I.R. 1938 Pesh. 49.**

——S. 116—*Denial of lessor's title—When permissible.*

A tenant is not estopped merely because by the tenancy he acknowledges the title of his landlord, and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance. (*Mosely, J.*) ALAGAMMAI ACHI *v.* P.L.P.R.P.R. FIRM. **177 I. C. 599=11 R.R. 152=A.I.R. 1938 Rang. 227,**

——S. 116—*Denial of title by tenant—Estoppel—Extent of applicability of doctrine—Plea of benami—Maintainability.*

It is well settled that if a tenant is inducted on the land by a person, that tenant cannot question

the title of the person who has so inducted him upon the land. The tenant is also estopped from urging that the man who has let him into possession is a benamidar of some other person. The doctrine of estoppel does not, however, extend after the discontinuance of the tenancy. (*R. C. Mitter, J.*) DEENA BANDHU GAN *v.* MAKIN SARDAR. **161 I.C. 468=8 R.C. 519=40 C.W.N. 460=A.I.R. 1936 Cal. 93=63 Cal. 763.**

——S. 116—*Denial of title of landlord's successor—Estoppel.*

S. 116 does not estop a tenant from denying the right, as his landlord, of person who claims to have succeeded to the landlord who put the tenant in possession. (*Coldstream; J.*) DAULAT RAM *v.* HAVELI SHAH. **182 I.C. 533=12 R.L. 55=41 P.L.R. 346=A.I.R. 1939 Lah. 49**

——S. 116—*Estoppel of tenant—Derivative title of plaintiff.*

Where the rent suit is brought by the daughters claiming to be heirs to the leasehold rights alleged to be the stridhan of their mother, though the tenants cannot dispute the title of their mother at the commencement of the lease they can dispute the derivative title of the plaintiffs. It is in such a case incumbent upon the plaintiffs to prove that the leasehold rights in question were the stridhan of their mother and they are entitled to inherit the said rights according to Hindu Law. (*Bhide, J.*) PARKASH KAUR *v.* GIAN CHAND. **A.I.R. 1940 Lah. 341.**

——S. 116—*Father holding shop as tenant, falling into arrears of rent—Son undertaking to pay the arrears and executing lease—Whether estopped from denying title of lessor.*

Where the defendant's father who held a shop as a tenant under the predecessor in title of the plaintiff fell into arrears of rent, and the defendant undertook to pay the arrears and to execute a *sarkhat*, it must be deemed that there was surrender by the father of the defendant followed by the defendant being let into possession under the lease executed by him in favour of the plaintiff. The defendant, in such circumstances, is estopped from denying the title of the lessor. (*Srivastava, Ag.C. J. and Smith, J.*) RAMZANI *v.* BANSIDHAR. **13 Luck. 76=166 I.C. 295=9 R.O. 303=1937 R.D. 26=1937 O.L.R. 4=1937 O.W.N. 49=A.I.R. 1937 Oudh 113.**

——S. 116—*Lessee not inducted on land by lessor--Representative in interest of lessee--If estopped from denying lessor's title.*

The representatives in interest of the lessee are estopped from questioning the title of the lessor, even if the lessee had not been inducted on the land by the lessor. (*Mitter and (Edgley, JJ.*) BARABONI COAL CONCERN, LTD. DEVA PRASANNA MUKHERJEE. **42 C.W.N. 1032.**

——S. 116—*Occupancy tenant—Sub-lease by, to defendant—Subsequent sub-lease to plaintiff—Defendant if tenant of plaintiff—Defendant formally admitted to occupation by plaintiff at some rent—Inference—Denial of title—Estoppel.*

G, an occupany tenant, gave a sub-lease of some land to the defendant. Subsequently he sub-let the land to the plaintiff without ejecting the defendant. It was found that the plaintiff after his sub-lease, sub-let the land to the defendant at the rent which the latter had hitherto been paying *G*, and that the defendant was formally admitted to occupation by the plaintiff as his sub-tenant.

Held, that the defendant was estopped from denying the relationship of landlord and tenant between the plaintiff and himself, and that he was liable to pay rent to the plaintiff, although in the absence of proof that plaintiff admitted defendant to occupancy, no relation of landlord and tenant would exist strictly. (*Drake Brockman, S.M. and Knox, J.M.*) MANGALI *v.* MADAN GOPAL. **1936 R.D. 343.**

——S. 116—*Plea of loss of title, subsequent to tenancy—If open to a tenant.*

In a suit by a landlord for rent, it is open to the tenant to plead in defence that the title of the plaintiff has, subsequent to the commencement of the tenancy, passed to somebody else, and that as such he was not entitled to the rent. S. 116 of the Evidence Act does not prevent a tenant from pleading that the title of the original lessor has since come to an end. (*Mulla, J.*) LUCKMAN CHAPLAIN *v.* PEARY LALL. **1939 A.W.R. (H.C.) 546=1939 R.D. 402=1939 A.L.J. 913=186 I.C. 274=12 R.A. 381=A.I.R. 1939 All. 670.**

——S. 116—*Scope—Lease—Sub-lease—Expiry of term of lease—Lessee holding over—Sub-lessee also not surrendering possession—Liability of sub-lessee to lessee for rent or damages for use and occupation—Suit by lessee against sub-lessee for arrears—Plea that plaintiff has no title due to expiry of lease—Maintainability—Estoppel.*

The mere fact that the lease in favour of a lessee of land has expired does not disentitle him to sue his sub-lessee and to claim rent or damages for use and occupation from him, when neither the lessee nor the sub-lessee have surrendered possession on such expiry. A lessee of land is under an obligation to surrender possession of the premises demised to his lessor from whom he derived possession; and until he fulfils that obligation, he is bound to pay his lessor either rent or damages for use and occupation. It is no doubt open to the sub-lessee to show that his title having expired he has surrendered possession to the original landlord from whom his lessor derived possession or to a person claiming by title paramount. In such cases no question of estoppel would arise; but when he is unable to plead a valid defence to his obligation to surrender possession, it would not be open to him to resist his lessor's demand for damages for the use and occupation during the period he has been in possession until he surrenders possession to the lessor. Even though, therefore, the original lessee's title may have expired, by the expiration of the term of his lease, until the sub-lessee shows that he has renounced the obligation of surrendering possession to him by commencing to hold under some other person either the landlord of the original lessee, (*i.e.*, his lessor) or a person claiming by title paramount or by delivering possession to him, the mere fact that the original lessee's title has expired is no defence to a suit by him against the sub-lessee for arrears of rent or damages for use and occupation. (*Venkataramana Rao, J.*) RAMIAH BAGHAVATHAR *v.* KARUPPAN SERVAI. **171 I.C. 642=45 L.W. 508**

=1937 M.W.N. 186=10 R.M. 379=A.I.R. 1937 Mad. 478=(1937) 1 M.L.J. 566.

———S. 116—*Scope—Person already in possession executing kabuliyat—If can challenge landlord's title.*

S. 116 of the Evidence Act is not confined to tenancies in which a person already in possession enters into a contract of tenancy. Where, therefore, a person in possession of land executes a kabuliyat, he is bound by the kabuliyat and estopped from challenging the title of his landlord unless he can prove fraud, misrepresentation, coercion or mistake. 1935 O.W.N. 449, Folld. (*Madeley, J.*) SAJJOO *v.* BASDEO PRASAD. **171 I.C. 84 =10 R.O. 83=1937 O.L.R. 518=1937 O.W.N. 1030=A.I.R. 1937 Oudh 505.**

———S. 116—Scope—Rule of estoppel—If modified by Presidency Small Cause Courts Act, S. 43. *See* PRESIDENCY SMALL CAUSE COURTS ACT, S. 43. **(1940) 1 M.L.J. 605.**

———S. 116—*Scope—Shikmi tenant in possession under original tenancy acknowledging tenancy to new patta-holder—If estopped from denying title of patta-holder.*

A shikmi tenant was already in possession of land under the original tenancy. The land subsequently was settled with a new patta-holder and the shikmi tenant acknowledged tenancy to the new patta-holder. The patta-holder sold the land to a third person who sued the shikmi tenant for rent. The shikmi tenant denied the title of the patta-holder through whom the vendee was claiming and also set up his own title by adverse possession.

Held, that there was no estoppel between the patta-holder and his vendee on one side and the shikmidar on the other. For setting up adverse possession against the new patta-holder it was not necessary for him to give up possession to the new patta-holder. (*Dhavle, J.*) PARAMESHWAR PANDAY *v.* RAMDHARI. **167 I.C. 141=9 R.P. 380= 3 B.R. 276=A.I.R. 1937 Pat. 27.**

———S. 116—*Scope—Suit on lease—Plea of denial of contract of tenancy—If barred—Estoppel on matter of law.*

S. 116 presupposes a provable contract of tenancy. When there is no denial of the landlord's title, but only a denial of a contract of tenancy, the section is not a bar. Further there can be no estoppel on a matter of law. (*Bose, J.*) MST. NASIBAN *v.* MOHAMMAD SAYED. **164 I.C. 557= 9 R.N. 41=19 N.L.J. 179=A.I.R. 1936 Nag. 174.**

———S. 116—*Scope and applicability—Assignment by lessee—Assignee, if estopped from denying lessor's title—Tenant already in possession at the time of lease—If can deny landlord's title.*

S. 116 of the Evidence Act does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licensor and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. Whether during the currency of a term the tenant by attornment to *A* who claims to have the reversion, or the landlord by acceptance of rent from *B* who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside S. 116 altogether; and it may well be that as in English law the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise, the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the *derivative* title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, *e.g.*, by attornment, acceptance of rent, etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end. There is in English case-law some authority for the view that a tenant is only estopped from denying his landlord's title if at the time when he took his lease he was not already in possession of the land. But in S. 116 the Indian Legislature has formulated no such condition. The words "at the beginning of the tenancy" give no ground for it. When a demise of land is made and acted on, when the tenant proceeds to occupy and enjoy under the grant, gets the shelter of the grantor's title and the benefit of his convenants, it is difficult to see why "during the continuance of the tenancy" he should be free of this form of estoppel. (*Sir George Rankin.*) KRISHNA PROSAD LAL SINGH DEO *v.* BARABONI COAL CONCERN, LTD. **64 I.A. 311=I.L.R. (1938) 1 Cal. 1= 31 S.L.R. 625=1937 All.L.J. 1389=169 I.C. 556=41 C.W.N. 1253=46 L.W. 201=1937 O. L.R. 398=1937 A.L.R. 623=1937 O.W.N. 866 =10 R.P.C. 38=3 B.R. 700=1937 P.W.N. 795=65 C.L.J. 563=18 Pat.L.T. 739=39 Bom.L.R. 1034=1937 A.W.R. 961=A.I.R. 1937 P.C. 251=(1937) 2 M.L.J. 286 (P.C.).**

———S. 116—*Scope and effect of—Expiry of period fixed in lease—estoppel against tenant if continues thereafter—Tenant neither paying rent nor accepting title of landlord since—Absence of evidence of landlord's assent to tenant's possession —Suit for possession more than 12 years after expiry of lease—Maintainability—Limitation Act, Art. 139.*

S. 116 of the Evidence Act only estops a tenant from disputing his landlord's title during the continuance of the tenancy. Where the tenancy originated in a lease, the estoppel continues even after the expiration of the period of the

EVIDENCE ACT (1872), S. 116.

lease, unless the tenant has openly surrendered possession or has at least given notice to his landlord that he claims under his own title. But in the absence of evidence to prove that the tenant paid rent to the landlord after the expiry of the lease, or that the landlord assented to the possession of the tenant after the determination of the lease, or that the tenant accepted the title of the landlord after that, it cannot be inferred that the relationship of landlord and tenant continued after such determination, and Art. 139 of the Limitation Act bars any suit to recover possession from the tenant after the expiry of twelve years from the date when the tenancy was determined. When the tenant has proved that the tenancy has been determined by efflux of time, it is for the landlord to prove that any tenancy was created or arose after such date. (*Horwill, J.*) SITHARAMIAH *v.* RAMASWAMY. **176 I.C. 84=11 R.M. 30 46 L.W. 848=A.I.R. 1938 Mad. 73.**

———**S. 116**—*Suit for ejectment by one of the co-sharers only—Land admittedly settled with defendant by plaintiff—Plaintiff's right to sue, if can be denied.*

In a suit for ejectment by one of the co-sharers only, it is not open to the defendant to deny the plaintiff's right to settle the land or to sue for the defendant's ejectment, when by his own plea he has admitted that the land was settled with him by the plaintiff. (*Harper, S.M. and Sathe, J.M.*) PIRTHI SINGH *v.* QABUL SINGH. **1940 R.D. 352=1940 A.W.R. (B.R.) 171.**

———**S. 116**—*Suit in ejectment—Plea of* jus tertii—*Estoppel against person whose title is set up—If estops tenant pleading* jus tertii.

In a suit in ejectment where the defendant relies on the title of a third party having no other title to rely on, it is always open to the plaintiff to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii*, whether the estoppel is by record, deed or in *pais*. (*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. **172 I.C. 268=10 R.M. 443=1937 M.W. N. 299=A.I.R. 1937 Mad. 544.**

———**S. 118**—*Child witness—Capacity to understand—Court's duty to test.*

S. 118 of the Evidence Act vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding; but this discretion must be exercised in a judicial manner. No doubt, the proposition that the competency of the witness to understand and give rational answers should be tested by Court by interrogating him before his examination is commenced, is not quite justified by the provisions of the section. But such a course should be pursued where the circumstances of the case make it plainly desirable. (*McNair and Khundkar, JJ.*) KRISHNA KAHAR *v.* EMPEROR. **I.L.R. (1939) 2 Cal. 569=187 I.C. 129=12 R.C. 550=41 Cr.L.J. 405=43 C.W.N. 1117=A.I.R. 1940 Cal. 182.**

———**S. 118**—*Child witness—Duty of Court.*

Where a young child is called as a witness the first step for the Judge or Magistrate to take is to satisfy himself by questioning the child that

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it is a competent witness within the meaning of S. 118. (*Mya Bu and Dunkley, JJ.*) AH PHUT *v.* THE KING. **1940 Rang.L.R. 104=185 I.C. 205=12 R.R. 185=41 Cr.L.J. 129=A.I.R. 1939 Rang. 402.**

———**S. 118**—*Child witness—Girl of five years—If competent witness—Child able to give rational answers—Omission to administer oath or affirmation—Effect—Evidence—Admissibility.*

A child of tender age, *e.g.*, a girl of five years, is a competent witness under S. 118 of the Evidence Act, provided the child is able to understand the questions put, and give rational answers; and it is usual for a Court to ascertain in the best way it can whether the child witness has sufficient intellectual capacity and understanding so as to be able to relate what the child has seen or heard at a particular incident. If the child can satisfy these conditions, the child is a competent witness; and if the competency is ascertained, the mere fact that the child is unable to comprehend either the spiritual or legal implications of an oath or solemn affirmation in consequence of the tender age, will not render the child incompetent to give evidence of facts within the child's personal knowledge. Nor does the fact that no oath or affirmation is administered to the child render the evidence inadmissible. (*Shankaranarayana Rao, O.C.J., and Sreenivasa Rao, J.*) LAKSHMINARAYANA SETTY *v.* GOVERNMENT OF MYSORE. **15 Mys.L.J. 217=42 Mys.H. C.R. 295.**

———**S. 122**—*Consent—If can be implied.*

Under S. 122, Evidence Act, the consent to the evidence being given cannot be implied. It is incumbent upon the Court to ask a party against whom the evidence is to be given whether he or she would consent to the evidence being given and not to admit it unless such consent is given. (*Ba U and Spargo, JJ.*) NGA TIN *v.* EMPEROR. **171 I.C. 529=10 R.R. 162=38 Cr.L.J. 1089=A.I.R. 1937 Rang. 347.**

———**Ss. 123 and 124**—*Accidents' register kept by doctor—If privileged document.*

The accidents' register kept by a medical practitioner is not a privileged document, and a Magistrate cannot therefore refuse to cause production of the same. (*Lakshmana Rao, J.*) VENKANNA *v.* EMPEROR. **189 I.C. 816=1939 M.W.N. 1128 (2)= 50 L.W. 796 (1)=A.I.R. 1940 Mad. 240.**

———**Ss. 123 and 124**—*Applicability—Offence under Madras Forest Act—Investigation by Forest Officer—Statement recorded by such officer during investigation—If privileged—Admissibility in evidence in trial.*

Statements made to and recorded by a Forest Range Officer in the course of an investigation into an offence under the Madras Forest Act do not relate to any affairs of state nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. No privilege can be claimed in respect of such statements under Ss. 123 and 124 of the Evidence Act and there is no reason why the record of such investigation should not be made available to the Court which tries the offence under the Act. It will be for the Court after perusing the statements and considering the objections as to their admissibility whether they are admissible or not. (*Pandrang Row, J.*) KALIYAPPA UDAYAN, *In re.*

EVIDENCE ACT (1872), S. 123.

168 I.C. 867=9 R.M. 655=38 Cr.L.J. 619=1937 M.W.N. 322=1937 M.Cr.C. 116=45 L.W. 470= A.I.R. 1937 Mad. 492=(1937) 1 M.L.J. 613.

———S. 123—*Departmental enquiry papers—If privileged.*

Departmental enquiry papers are not unpublished documents relating to affairs of State. 16 C. W. N. 431 and 40 Cal. 898, Foll. (*Niyogi, A.J.C.*) IBRAHIM SHERIFF *v.* SECRETARY OF STATE. 161 I.C. 668=8 R.N. 230=A.I.R. 1936 Nag. 25.

———S. 123—*Privilege—Diary of foot constable shadowing movements of suspect.*

Under S. 123 it is only when the document deals with affairs of State that privilege can be rightfully claimed under the section. The diary of a foot constable who was shadowing the movements of a suspect could not posibly become an affair of the State within the accepted meaning of the words. (*Dalip Singh and Sale, JJ.*) MOHAN SINGH *v.* EMPEROR. 188 I.C. 717= 13 R.L. 56=41 Cr.L.J. 667=42 P.L.R. 484=A.I.R. 1940 Lah. 217.

———Ss. 123, 124, and 162—*Privilege—State not a party—Rules governing production of documents.*

Where the state is not a party the following rules govern the question of production of records, claim of privilege, etc.—(1) All documents called for must be produced. (2) In case of state documents the privilege should be claimed by the witness who is summoned to produce them. (3) When objection is taken the Court cannot inspect the document but can take other evidence to determine its nature. (4) Ordinarily it is enough if the head of the department certifies that it refers to an affair of state. (5) The Court need not accept it as final but may require further evidence. (6) If the Court decides that it is not privileged, the document should be tendered in evidence. (7) If the Court considers it a state document, it cannot be admitted in evidence unless with the permission of the head of the department. (*Bose, J.*) BHAIYA SAHEB *v.* RAMNATH. I.L.R. (1940) Nag. 280=179 I.C. 865 =11 R.N. 324=A.I.R. 1938 Nag. 358.

———S. 123—*Privilege claimed under—Duty of head of department.*

The law requires that before privilege is claimed the head of the department should have the document in front of him, should give his attention to the matter, should weigh carefully whether the privilege should or should not be claimed and unless he is satisfied that affairs of State are concerned he should not claim privilege for a document or withhold from a Court the means of judging whether a particular witness's statement is true or not true. It is true that the head of a department has an absolute privilege on the point, it is for him to decide whether the matter is one in which privilege should be claimed or should not be claimed, but it would be good to follow the practice of the English law, namely that some indication should be given to the Court as to why privilege is claimed or what affairs of State are involved in the matter. Without such indication, there is always a danger that the Court may draw an adverse inference from the non-production of the document. The Court is entitled, according to the circumstances of each particular

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case, to draw an inference adverse to the party claiming the privilege. (*Dalip Singh and Sale, JJ.*) MOHAN SINGH *v.* EMPEROR. 188 I.C. 717 =13 R.L. 56=41 Cr.L.J. 667=42 P.L.R. 484 =A.I.R. 1940 Lah. 217.

———Ss. 123 and 124—*Public officer claiming privilege—Duty of Court.*

Where a public officer declines to produce certain document, claiming privilege under Ss. 123 and 124, Evidence Act, it is for the Court trying the suit in which the documents are required, in the first instance to satisfy itself that the documents relate to any State affair or that their production will be detrimental to public interests and it is not for the public officer to decide whether the documents are privileged. The Privilege regarding production of documents is a narrow one and the mere fact that their production is likely to prejudice the Crown's case is no reason for their non-production. A.I.R. 1922 All. 37 and A.I.R. 1931 P.C. 254, Foll. (*Niyogi, A.J.C.*) IBRAHIM SHERIFF *v.* SECRETARY OF STATE. 161 I.C. 668=8 R.N. 230=A.I.R. 1936 Nag. 25.

———Ss. 123, 124 and 162—*Relative scope and effect—Claim to privilege—Sustainability—Conditions.*

Wassoodew, J.—S. 162 of the Evidence Act deals with the production of documents in answer to summons and it is obligatory on a witness so summoned, to produce the documents called for by the Court; he has no right to determine whether the document shall be produced. When producing them, it is for him to claim privilege, if the documents are privileged, and it is the duty of the Court to determine whether the documents shall be admitted and exhibited. Ss. 162 and 123 protect the discovery of documents relating to matters of state. There is difference between a private witness called upon to produce documents and a public officer summoned to produce public record. S. 124 is more particular and lays down the rule of public policy and the limits within which the production can be withheld, in other words, the character and quality of the privilege. The condition precedent to or the test of privilege under S. 124 is that the communication was made to the public officer in official confidence. The question is primarily to be decided by the Cort before whom the privilege is claimed. It should be claimed at the earliest opportunity, and it is futile to claim the privilege at a late stage when there has already been a disclosure of the document given in charge of the Court. (*Wassoodew and Sen, JJ.*) BHALCHANDRA DATTATRAYA *v.* CHANBASAPPA MALLAPPA. 183 I.C. 225= 12 R.B. 69=41 Bom.L.R. 391=A.I.R. 1939 Bom. 237.

———S. 124—*Disclosure if would harm public interests—Who is to decide—Function of a Court in relation to claim of privilege.*

Though there is no doubt that the public officer claiming privilege is the sole Judge as to whether the disclosure of certain communications would harm the public interests, yet the question as to whether the communications concerned were made in official confidence, has to be decided by the Court. (*Hamilton, J.*) CHANDRA DHAR TEWARI *v.* DEPUTY COMMISSIONER, LUCKNOW. 14 Luck. 351=11 R.O. 148=178 I.C. 982=1938 O.W.N. 1354=1938 A.W.R. (C.C.) 140=1938 O.L.R. 548=1939 O.A. 85=A.I.R. 1939 Oudh 65.

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——S. 124—*Object—Disclosure already made to a person not in confidence—Section, if applies.*

S. 124 of the Evidence Act is designed to prevent the knowledge of official papers beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. As the object is to prevent the disclosure of things not known outside that circle which is in confidence, the section has no application when once there has been a disclosure to what may be called a member of the public to whom the contents of such papers has not been made known in confidence. (*Hamilton, J.*) CHANDRA DHAR TEWARI *v.* DEPUTY COMMISSIONER, LUCKNOW. **14 Luck. 351=11 R.O. 148=178 I.C. 982=1938 O.W.N. 1354=1938 A.W.R. (C.C.) 140=1938 O.L.R. 548=1939 O.A. 85=A.I.R. 1939 Oudh 65.**

——S. 124—*Privilege—Claim to—Conditions—Communication to public officer in official confidence—Considerations for Court.*

For the purposes of S. 124 of the Evidence Act, communication has to be made to the public officer who considers that the public interest suffers by its disclosure. It is for the Court to decide whether or not a particular document for which privilege is claimed was a communication made to a public officer in official confidence, and if the Court decides that it was so made, then it has no authority to compel the public officer to produce it; for the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests. Where the statement contained in a document was not intended to be made public, it must be said that it was made in official confidence. It is not,, however, enough for the public officer to merely claim privilege. He must apply his mind to the question whether public interests are likely to suffer by the disclosure of the contents of the document called for; and only if he considers that public interests would suffer by such disclosure, would the Court grant privilege. (*Wassoodew and Sen, JJ.*) BHALCHANDRA DATTATRAYA *v.* CHANBASAPPA MALLAPPA. **183 I..C 225=12 R.B. 69=41 Bom.L.R. 391=A.I.R. 1939 Bom. 237.**

——S. 124—*Privilege—Duty of authority claiming.*

It is not proper for an authority claiming privilege to claim privilege without considering particular papers and then coming to a decision whether privilege should or should not be claimed. (*Hamilton, J.*) CHANDRA DHAR TEWARI *v.* DEPUTY COMMISSIONER, LUCKNOW. **14 Luck. 351=11 R. O. 148=178 I.C. 982=1938 O.W.N. 1354=1938 A.W.R. (C.C.) 140=1938 O.L.R. 548=1939 O. A. 85=A.I.R. 1939 Oudh 65.**

——S. 124—*'Public officer'—Agent of Railway company—C. P. Code, S. 2* (e).

The Agent of a Railway Company is not a public officer as defined in S. 2 (*e*), C. P. Code, although he has power under S. 131 of the Railways Act to arrest certain persons for offences committed on the Railway. He cannot, therefore, object to produce documents in his possession under S. 124 of the Evidence Act. (*Derbyshire, C.J. and Nasim Ali, J.*) THE AGENT, ASSAM BENGAL RAILWAY CO., LTD. *v.* SURENDRA CHANDRA CHAKRAVARTY.

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I.L.R. (1939) 2 Cal. 46=12 R.C. 113=182 I.C. 870=43 C.W.N. 664=A.I.R. 1939 Cal. 386.

——S. 124—*Public officer—Meaning of—Court of Wards—If come under the section.*

The most reasonable construction of the term 'public officer' in S. 124 of the Evidence Act is to be partly derived from the section itself. He is an officer with public as opposed to private duties who received communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The Court of Wards, for the purposes of S. 124 is to be considered as a Government office and its officers public officers. (*Hamilton, J.*) CHANDRA DHAR TEWARI *v.* DEPUTY COMMISSIONER, LUCKNOW. **14 Luck. 351=11 R.O. 148=178 I.C. 982 =1938 O.W.N. 1354=1938 A.W.R. (C.C.) 140 =1938 O.L.R. 548=1939 O.A. 85=A.I.R. 1939 Oudh 65.**

——S. 132 Proviso—*"Compelled"—Meaning of—Evidence given by witness for prosecution in prior case—Admissibility in subsequent case against him as accused.*

The proviso to S. 132 of the Evidence Act can be reasonably interpreted as giving protection to witnesses really giving evidence which is elicited from them in their examination and given by them in the course of their duty to state truthfully what they know about the case but not so as to protect witnesses who take the opportunity of being in the witness box to say things which by no stretch of language it could be properly represented they were compelled to say within the meaning of the proviso. A witness called to give evidence for the prosecution in a case is intended by S. 132 to be protected in respect of what he says in the course of his examination from having that evidence used against him when he is an accused person. Such evidence given by an accused person as a witness in a previous case cannot be used against him when he is on trial as an accused. (*Reilly, C.J. and Abdul Ghani, J.*) SUNDARAMMA *v.* GOVERNMENT OF MYSORE. **17 Mys.L.J. 102= 43 Mys.H.C.R. 675.**

——S. 132, Proviso—*Compulsion—What amounts to.*

The compulsion contemplated in the proviso to S. 132 of the Evidence Act is something more than being put into the box and being sworn to give evidence; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without exception, it would amount to compulsion. If he hesitates to answer and the Court tells him he must answer the question, the hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso. 52 M. 432 (437), Foll. (*Baguley, J.*) RASOOL BHAI *v.* LALL KHAN. **1939 Rang.L.R. 479=184 I.C. 566=41 Cr.L.J. 48= 12 R.R. 159=A.I.R. 1939 Rang. 371.**

——Ss. 133 and 114, Ill. (b)—*Accomplice as witness.*

There is nothing improper in tendering an accomplice as a witness apart from any question of pardon. Such a person is a competent witness and there is no irregularity in not sending up for trial every person against whom any suspicion appears

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to exist. It may on occasions be desirable to include the evidence of an accomplice for what it is worth without tendering him a pardon. The question of the weight of such a person's evidence is of course important since he will naturally have a strong motive for minimizing his own part in any criminal transaction and hence his evidence must be treated with greater caution than that of an established approver. (*Roberts, C.J. and Dunkley, J.*) NGA THEIN PE *v.* THE KING. **184 I.C. 545=12 R.R. 155=41 Cr.L.J. 44=A.I.R. 1939 Rang. 361.**

———**Ss. 133 and 114, Ill. (b)**—*Accomplice's evidence—Value of.*

The rule of law says that an accomplice is competent to give evidence, and the rule of practice says that it is almost always unsafe to convict upon his testimony alone. But the rule of law to this extent triumphs over the rule of practice that if special circumstances exist which render it safe, in an exceptional case to act upon the uncorroborated testimony of an accomplice and upon that alone, the Court will not merely for the reason that the conviction proceeds upon such uncorroborated testimony say that the conviction is illegal. This is the plain meaning of S. 133 of the Evidence Act. There is no difference between the law in India and the law in England in this respect. (*Roberts, C.J. and Leach, J.*) AUNG PE *v.* EMPEROR. **1937 Rang.L.R. 110=169 I.C. 705=10 R.R. 19=38 Cr.L.J. 785=A.I.R. 1937 Rang. 209.**

———**S. 133**—Accomplice's evidence—Confession of co-accused—Value of—Distinction. *See* EVIDENCE ACT, S. 30. **38 Bom.L.R. 1122=A.I.R. 1937 Bom. 31.**

———**S. 133**—*Accomplice—Who is.*

Where a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime, as it is well settled that all accessories before the fact, if they participate in the preparation for the crime are accomplices, but if their participation is limited to the knowledge that crime is to be committed, they are not accomplices. Whether a person is or is not an accomplice therefore depends upon the facts in each particular case considered in connexion with the nature of the crime; and persons to be accomplices must participate in the commission of the same crime as the accused persons in a trial. All persons coming technically within the category of accomplices cannot be treated as on precisely the same footing. (*Guha and Bartley, JJ.*) NARAIN CHANDRA BISWAS *v.* EMPEROR. **161 I.C. 289=37 Cr.L.J. 445=8 R.C. 508=63 C.L.J. 191=1936 Cr.C. 200 (2)=A.I.R. 1936 Cal. 101.**

———**S. 133**—Accomplice—Who is—Accessory after the fact. *See* EVIDENCE ACT, Ss. 114, ILL. (*b*) AND 133. **A.I.R. 1937 Rang. 513.**

———**S. 133**—*Approver — Corroboration—Nature of evidence necessary.*

An approver's statement must be regarded with suspicion and cannot be accepted without material corroboration. The prosecution has not only to produce substantial evidence to corroborate the statement of the approver that he took part in the commission of the offence, but also that the other accused took part with him. (*Weston.*) GANESH *v.* EMPEROR. **1937 A.M.L.J. 123.**

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———**S. 133**—*Uncorroborated evidence of approver—Conviction, if can be based on—Discretion of Court.*

S. 133 of the Evidence Act gives the court a discretion to base a conviction solely on the uncorroborated evidence of an approver. Such a conviction is not illegal. (*Baguley, J.*) NGA MYO *v.* THE KING. **1938 Rang.L.R. 213.**

———**S. 138**—*Re-examination—Object of—New matter introduced in re-examination—Right of accused to cross-examine.*

The object of re-examination is to clear the ambiguities in cross-examination and if new and important matter is allowed to be introduced in re-examination by the prosecution, the accused has a right to cross-examine the witness as regards the matters so introduced. (*Iqbal Ahmad, J.*) SALIG RAM *v.* EMPEROR. **1936 A.W.R. 967=1936 A.Cr.C. 207=1937 A.L.R. 201=167 I.C. 515=38 Cr.L.J. 416=A.I.R. 1937 A. 171.**

———**S. 145**—*Applicability—Illiterate person.*

An illiterate person is not immune from the processes of law with regard to contradiction by a previous statement, because S. 145 makes not the slightest difference whether the witness is literate or illiterate. (*Young, C.J. and Blacker, J.*) MUZAFFAR KHAN *v.* EMPEROR. **I. L. R. (1939) Lah. 509=182 I.C. 935=12 R.L. 80=40 Cr.L.J. 708=41 P.L.R. 775=A.I.R. 1939 Lah. 268.**

———**S. 145**—Applicability—Suit on hand note—Denial of debt but admission of signature on blank paper—Admission of debt contained in affidavit of defendant filed in prior case—Use of—Conditions. *See* EVIDENCE ACT, Ss. 21 AND 145. **17 Pat. L.T. 621.**

———**S. 145**—*Approver going back on confession—Use of such confession—Extent.*

Where an approver goes back upon his confession, it can be used to contradict him when he is treated as a hostile witness, but it is not substantive evidence and cannot be used to contradict a co-accused's confession. (*Niyogi and Pollock, JJ.*) BALIRAM SINGH *v.* EMPEROR. **184 I.C. 274=12 R.N. 106=40 Cr.L.J. 937=1939 N.L.J. 442=A.I.R. 1939 Nag. 295.**

———**S. 145**—*Compliance with—Sufficiency.*

Where the whole of the previous statement made by the witness is read out to him and he is cross-examined in respect of it but he gives evasive replies, S. 145 of the Evidence Act is fully complied with, although the witness is not specifically asked about particular portions of that statement. (*Tek Chand, J.*) BADRI PRASHAD *v.* HIRA LAL. **40 P.L.R. 471.**

———**S. 145**—*Inquest report—Statements in—Use of to contradict evidence of inquest officer.*

Statements contained in the inquest reports cannot be used to discredit the evidence of the inquest officer unless they are put to him under S. 145, Evidence Act. (*Burn and Venkataramana Rao, JJ.*) VEERANKUTTI HAJI *v.* EMPEROR. **48 L.W. 615=177 I.C. 808=11 R.M. 387=39 Cr. L.J. 947=1938 M.W.N. 868=(1938) 2 M.L.J. 618.**

———**S. 145**—*Plaintiff's witness—Documents executed by such witness produced by defendant to contradict witness—Admissibility.*

Where a plaintiff brought a suit for declaration that a certain house was his and he examined as

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his witness his neighbour who had executed certain sale-deeds in which the house in suit was stated to be that of defendant, and the defendant produced these sale-deeds while cross-examining the said witnesses.

Held, that the documents were rightly admitted in evidence by the Court. (*Tek Chand, J.*) DAS MAL *v.* SUNDERSINGH. **174 I.C. 751=10 R.L. 592=A.I.R. 1937 Lah. 480.**

——S. 145—*Previous deposition of witness—Contradiction—Mode of.*

A person cannot be allowed to impeach the credit of a witness by showing that he had in a previous deposition given statements which are contradictory to his subsequent statement, unless, his attention was invited to those parts of it by which it is intended to contradict him. (*Nawal Kishore, C.J. and Ranjitmal, J.*) CHOTHU *v.* SARKAR. **1939 Mar.L.R. 76 (Cri.).**

——S. 145—*Previous statement of party containing an admission—When can be relied on.*

When a previous statement made by a party in another suit is relied on as containing an admission, that party should be asked to explain that previous statement when he is in the witness-box. (*Bhide, J.*) UDE BHAN *v.* DAULAT RAM TAKIYA RAM. **170 I.C. 315=10 R.L. 103 (1)=39 P.L.R. 200.**

——S. 145—*Proof of previous statement—Necessity for.*

There is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement, first to prove that statement. S. 145, Evidence Act, has to be read with S. 162, Cr. P. Code, and quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statements thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done later by calling the person before whom the statement was made. (*Young, C.J. and Blacker, J.*) MUZAFFAR KHAN *v.* EMPEROR. **I.L.R. (1939) Lah. 509=182 I.C. 935=12 R.L. 80=40 Cr.L.J. 708=41 P.L.R. 775=A.I.R. 1939 Lah. 268.**

——Ss. 145 and 155—*S.* 145, *if controls S.* 155—*Questions about oral statements made—If can be disallowed.*

S. 145 of the Evidence Act must be taken as it is, uninfluenced by any consideration derived from the previous state of the law or the English law upon which it may be founded. It makes no mention of oral statements. It therefore cannot, control S. 155. Hence questions with reference to statements made by one witness to another are legally admissible, though the Court could refuse to rely on them on the ground that they had not been put to the witnesses concerned for explanation. (*Niyogi and Gruer, JJ.*) MUKTAWANDAS *v.* EMPEROR. **I.L.R. (1939) Nag. 109=180 I.C. 602=11 R.N. 377=40 Cr.L.J. 393=1938 N.L.J. 434=A.I.R. 1939 Nag. 13.**

——S. 145—*Replication filed by party—Use of.*

A replication filed by a party under O. 6, R. 5, C. P. Code, can be used as a previous statement to contradict the statement made by him in Court under S. 145 of the Evidence Act. (*Bhide, J.*)

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BEHARI LAL SUD *v.* EMPEROR. **185 I.C. 588=41 Cr.L.J. 204=12 R.L. 313=41 P.L.R. 652=A.I.R. 1939 Lah. 529.**

——S. 145—*Scope—Document containing prior statement of witness—Admissibility to contradict witness—Document containing admission and otherwise relevant—Necessity to draw attention of witness specifically to statement sought to be used.*

Before a previous statement of a witness in writing can be used to contradict his evidence, his attention must be specifically drawn to the statement sought to be used under S. 145 of the Evidence Act. That is, however necessary only if the document containing the statement becomes relevant solely under the section and is otherwise irrelevant and inadmissible. If the document is otherwise relevant and admissible as an admission under S. 21 of the Act, it is not necessary to observe the provisions of S. 145 before using it. (*James and Rowland, JJ.*) RAMKESHWAR DAS *v.* BALDEO SINGH. **165 I.C. 805=9 R.P. 213=17 Pat.L.T. 621=1936 P.W.N. 635=A.I.R. 1936 Pat. 588.**

——S. 145—*Witness sought to be contradicted in cross-examination by his statement to police—Cross-examination subject to subsequent proof of statement—Permissibility.*

Where a witness is sought to be contradicted by a statement made by him to the police, it is not necessary that such statement must first be proved before the witness is allowed to be cross-examined upon it. In order to avoid delay, there can be no objection to the witness being cross-examined on his statement to the police, provided that the statement is proved subsequently. A.I.R. 1935 Rang. 98, Foll. (*Almond, J.C. and Mir Ahmad, J.*) MD. ZAMAN *v.* EMPEROR. **174 I.C. 678=10 R. Pesh. 71=39 Cr.L.J. 627=A. I. R. 1938 Pesh. 18.**

——Ss. 146 and 148—*Questions as to character—Limits of.*

Magistrate should confine questions as to character asked in cross-examination to questions which are relevant to the case, and disallow questions which are unnecessary, provocative or merely harassing. (*Mosely, J.*) S. PILLAY *v.* SHAIK THUMBY SAHIB. **189 I.C. 705=41 Cr. L.J. 790=A.I.R. 1940 Rang. 113.**

——S. 154—*Discretion of Court—Permission to declare prosecution witnesses hostile and to cross-examine them—Grant of.*

S. 154, Evidence Act, in no way fetters the discretion of the Court to permit leading questions to be put by a party to his own witnesses; the Court has unfettered discretion to allow the prosecutor to cross-examine prosecution witnesses, after declaring them hostile. (*Rowland, J.*) DEODHARI KOERI *v.* EMPEROR. **166 I.C. 726=9 R.P. 342=38 Cr.L.J. 271=3 B.R. 216=A.I.R. 1937 Pat. 34.**

——S. 154—*Evidence of hostile witness—Value of—Entire evidence, if should be rejected.*

When a witness becomes hostile it would in certain cases be unsafe to accept any portion of the testimony which he has rendered in examination-in-chief. To pick and choose between the statement such a witness makes in examination in chief would sometimes be an unsound proceeding. But it would be quite wrong to hold that a

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Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there. (*Khundkar, J.*) RAMESH CHANDRA DAS *v.* NATIONAL TOBACCO CO. OF INDIA, LTD. **44 C.W.N. 999=A.I.R. 1940 Cal. 536.**

——S. 154—*Hostile witness—Evidence of—Value of—"Declared hostile"—Use of—Desirability—Permission to treat witness as hostile—Grant of—Duty of Court.*

It is now settled that the evidence of a witness who is cross examined by the party calling him is still evidence and can be relied on by either party, the credibility of the facts deposed to being a matter for the jury. There is no legal objection to permission to treat a witness as hostile being granted freely, although it is preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance. (*Rowland and Chatterjee, JJ.*) NEBTI MANDAL *v.* EMPEROR. **19 Pat. 369=1940 P.W.N. 73=A.I.R. 1940 Pat. 289.**

——S. 154—*Witness's answers in direct conflict with other evidence—Permission to cross-examine—If allowable.*

That the witness's answer to certain questions is in direct conflict with evidence of other prosecution witnesses is not and can never be a reason for allowing the witness to be treated as hostile and permitted to be cross-examined. (*Beasley, C.J. and King, J.*) RATNASABAPATHI GOUNDAN *v.* PUBLIC PROSECUTOR. **59 Mad. 904=164 I.C. 243=9 R.M. 99=37 Cr.L.J. 909=1936 M.W.N. 459=44 L.W. 155=1936 Cr.C. 635=A.I.R. 1936 Mad. 516=71 M.L.J. 231.**

——S. 155—If controlled by S. 145. *See* EVIDENCE ACT, Ss. 145 AND 155. **1938 N.L.J. 434.**

——S. 155—*Witness not believed in judgment in another case—If impeaches his credit.*

The credit of a witness may only be impeached as provided by S. 155, Evidence Act, and not otherwise. Even the fact that a witness has not been believed in a judgment in another case does not impeach the credit of the witness, for such a judgment cannot be given in evidence for the purpose. Judgment in other cases are relevant only under Ss. 40 to 43, Evidence Act. (*Hamilton, J.C. and Mir Ahmad, A.J.C.*) MIR JAWALI *v.* EMPEROR. **162 I.C. 300=37 Cr.L.J. 619=8 R. Pesh. 194=1936 Cr.C. 314=A.I.R. 1936 Pesh. 106.**

——S. 157—*Construction—'Former statement'—Meaning of.*

The words 'former statement' in S. 157 of the Evidence Act mean a previous statement of the witness who is to be corroborated made on another occasion, (*i.e.*) an occasion other than that at which the subsequent statement requiring corroboration is made. (*S. N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. **66 C.L.J. 196=174 I.C. 36=10 R.C. 607=39 Cr.L.J. 395=A.I.R. 1938 Cal. 125.**

——S. 157—*Corroboration—Procedure.*

Ordinarily before the corroborative evidence is admissible, the evidence sought to be corroborated must be given. Where in support of the plaintiff's case a witness for the plaintiff produces a letter written to him by another witness but

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before the production of such letter the witness does not make any statement whatsoever, which is sought to be corroborated by the letter, the letter cannot be admissible in evidence under S. 157, Evidence Act. (*Venkatasubba Rao, J.*) MUTHU GOUNDAN *v.* CHINNIAH GOUNDAN. **174 I.C. 806=10 R.M. 740=A.I.R. 1937 Mad. 861.**

——S. 157—*Corroborative evidence—Admissibility.*

In a litigation between a nephew *F* and his uncle in respect of certain land the nephew got a decree but as his uncle would not give him possession in spite of the decree the nephew had to resort to Criminal Court without success. One day while the sons of the uncle *G* and *A* accompanied by *M* were bringing sheaves of wheat from the disputed field, *G* was shot dead and *F* was alleged to be the murderer. On behalf of the prosecution *A* and *M* gave the story as set out above. On behalf of the prosecution there were two other independent witnesses who were in the neighbourhood of the place at the time of the crime. They said that they heard two shots, went to the scene of murder, found deceased lying dead and were told by *A* and *M* that *F* had murdered him.

Held, that the statements of the two independent witnesses were admissible under S. 157 to corroborate *A* and *M* in that they charged *F* at once. (*Almond, J.C. and Mir Ahmad, J.*) FAKIR JUMMA KHAN *v.* EMPEROR. **10 R. Pesh. 63=40 Cr.L.J. 334=180 I.C. 239=A.I.R. 1939 Pesh. 4.**

——S. 157—Deed not *inter partes*—Recital in as to boundary—Admissibility as corroborative contemporary statement. *See* EVIDENCE ACT, Ss. 32 (3) AND 157. **1940 M.W.N. 80.**

——S. 157—*First information report—Use of.*

The first information report can be used only to corroborate or to contradict the testimony of the witness who made it. It is inadmissible as a piece of positive evidence directly supporting the prosecution. Where it does not corroborate the testimony of such witness, it can only be used to contradict the evidence of him given in Court and as an indication that the defence story set up is false. (*Skemp, J.*) HARNAM SINGH *v.* EMPEROR. **38 P.L.R. 203=165 I.C. 146=37 Cr. L.J. 1079=9 R.L. 218=1936 Cr.C. 833=A.I.R. 1936 Lah. 833.**

——S. 157—*Reference by witness to deed to which he was not party—Permissibility.*

In a suit for possession of certain shop one *G*, who was a near neighbour of the plaintiff, gave evidence. He said that the shop in dispute belonged to the plaintiff and in support of his testimony produced some rent deeds executed in his favour which in the recital of the boundaries gave the shop in dispute as the property of the plaintiff. *G* actually did not sign any one of the deeds.

Held, that *G* could not refer to deeds to which he was not a party, *i.e.*, to statements which he did not make as corroborative evidence under S. 157. (*Skemp, J.*) KHEMAN *v.* CHHOTU. **179 I.C. 68=11 R.L. 523=40 P.L.R. 968=A.I.R. 1938 Lah. 635.**

——S. 157—Sanchas—*Admissibility and use of in proceedings under S. 107, Cr. P. Code.*

In proceedings under S. 107, Cr. P. Code, *sanchas* or reports made by the prosecution witnesses

on various dates against the accused in the absence of the latter, are not substantive evidence of the matters mentioned in them; but under S. 157 of the Evidence Act, such reports can be used in order to corroborate what the witnesses testify to in Court when they are examined in Court. (*Rowland, J.*) MAHABIR GOPE *v.* SAMRATHI SINGH. **189 I.C. 457=41 Cr.L.J. 746=13 R.P. 124=6 B.R. 837=21 P.L.T. 652=1940 P.W.N. 52=A.I.R. 1940 Pat. 252.**

———**S. 159**—Panchayatnamas *prepared by police for recovery of articles on information by accused—Use of—Admissibility as substantive evidence.*

There is no provision in the Evidence Act by which *panchayatnamas* prepared by the police for the recovery of articles on information given by the accused can be used as substantive evidence. If they are prepared at the time, they can be used by the witnesses for the purpose of refreshing their memories in the witness-box under S. 159, but in themselves they are not evidence. (*Burn and Stodart, JJ.*) SEETHA RAMI REDDI *v.* EMPEROR. **184 I.C. 327=12 R.M. 436=40 Cr.L.J. 925=1939 M.W.N. 465=A.I.R. 1939 Mad. 766.**

———**S. 159**—Record of statement of deceased person—Proof. *See* EVIDENCE ACT, Ss. 32 (1), 159 AND 160. **1936 Cr.C. 41=A.I.R. 1936 Rang. 42.**

———**S. 159**—*Statements in first information reports, medico-legal reports, etc.—Mode of proof.*

The practice of referring to statements in the first information reports, medico-legal reports, etc., as if they were evidence is not justified by law. The proper course is for witness to refer to the document which he has prepared at the time under S. 159, Evidence Act, and state in Court everything which the prosecution, or Counsel for defence, or the trying Magistrate or Judge considers material. Hence anything in such a report which is not sworn to by the witness in Court cannot be referred to by the Judge. (*Skemp, J.*) MAHOMED SALABAT *v.* EMPEROR. **170 I.C. 253=10 R.L. 88=38 Cr.L.J. 869=39 P.L.R. 290=A.I.R. 1937 Lah. 475.**

———**S. 160**—Statement by deceased person—Admissibility and proof of. *See* EVIDENCE ACT, Ss. 32 (1), 159 AND 160. **1936 Cr.C. 41=A.I.R. 1936 Rang. 42.**

———**S. 160**—*Witness not recollecting facts nor stating that he had reported facts correctly—Evidence of such witness—Admissibility.*

Where no attempt is made by a witness to state orally before the Court, what the accused in the case was alleged to have said, nor does he state before the Court, that although he has no specific recollection of the facts themselves, he was sure that the facts were correctly reported by him in his report, the evidence of such witness is inadmissible in evidence. (*Blacker, J.*) PINDI DAS *v.* EMPEROR. **40 P.L.R. 872=177 I.C. 707=11 R.L. 357=39 Cr.L.J. 930=A.I.R. 1938 Lah. 629.**

———**S. 162**—*Privilege—State document—Test.*

Police during an investigation seized account books of a certain person and made copies of it in their diary. In a later civil suit that person denied that he kept accounts and hence the other party called for the copies of the account books

made by the police to be produced in evidence. Police refused to produce the copies claiming the privilege of "State document",

Held, where account books were not State documents, copies of them could not assume this important shape simply because they were written in the course of a police investigation. Neither the police nor any other person can evade the normal rules of disclosure by the simple expedient of entering matter for which no privilege can be claimed into an otherwise privileged document. (*Bose, J.*) BHAIYA SAHEB *v.* RAMNATH. **I.L.R. (1940) Nag. 280=179 I.C. 865=11 R.N. 324=A.I.R. 1938 Nag. 358.**

———**S. 163**—*Police-diary in Calcutta—Accused inspecting witness's statement to contradict him—If bound to give entire statement as evidence.*

S. 163 of the Evidence Act is applicable to criminal trials as well as to civil actions. If during cross-examination of a witness the counsel for the accused calls for the statement of that witness recorded by the police in Calcutta during investigation and inspects it for the purpose of contradicting the witness, the Government counsel is entitled to require the counsel for the accused to give the whole of the statement as evidence excluding only such portions as are not relevant to the case, although that would bring on the record those parts of the statement which are corroborative of the witness's evidence at the trial in addition to those brought on the record by counsel for the accused as being contradictory of that evidence. But where there is no formal notice or requisition from the accused calling for the police diary and the Government counsel produces it stating that he will not "rely on the strict technicality" thereby giving the impression, although the impression is unintended, that he will not require counsel for the accused to put in the document as a whole, the accused cannot be compelled to give as evidence the entire statement in question. (*Rau, J.*) EMPEROR *v.* MAKHAN LAL DATTA. **I.L.R. (1939) 2 Cal. 429=187 I.C. 138=41 Cr.L.J. 408=12 R.C. 553=A.I.R. 1940 Cal. 167.**

———**S. 167**—*Improper admission of evidence—Duty of Court—Conviction on the remaining evidence.*

Where there has been an improper admission of evidence, a Judge would be acting correctly under S. 167 of the Evidence Act, if he comes to the conclusion that the rest of the evidence is sufficient to justify the conviction. (*Gruer, J.*) JAMNA PRASAD *v.* EMPEROR. **I.L.R. (1940) Nag. 188=39 Cr.L.J. 427 (2)=174 I.C. 523=10 R.N. 417=A.I.R. 1938 Nag. 325.**

EX-COMMUNICATION—Effect of—Son of excommunicated person—If affected—Deed of excommunication—Construction. *See* HINDU LAW ADOPTION. **39 Bom.L.R. 211=A.I.R. 1937 Bom. 169.**

EXECUTION.

See also C.P.C. S. 47 AND O. 21 (2)—DECREE.

Amendment of application.
Application for.
Appropriation of payments.
Attachment.
Benamidar.
Compromise.

Costs.
Delivery of possession.
Executability of decree.
Executing Court.
Equitable execution.
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Jurisdiction.
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Amendment of application.

———Amendment—Defective application for execution—Particulars of property to be attached not specified—Amendment after limitation—Jurisdiction of Court. *See* C.P.CODE, O.21, R.17. **40 Bom. L.R. 676.**

Application for.

———Application—Order dismissing on grant of time to judgment-debtor—If final order of disposal—Judicial or administrative order. *See* C.P. CODE, S. 73. **70 M.L.J. 683.**

———*Application for—Decree passed by District Judge, Dera Ismail Khan—On passing of Frontier Courts Regulation, Court of District Judge becoming Court of Senior Subordinate Judge—Application for execution based on transfer certificate granted by District Judge (new style)—If competent.*

A decree was passed by the Court of the District Judge, Dera Ismail Khan. After the passing of the decree the Frontier Courts Regulation came into force and the Court of the District Judge became the Court of the Senior Sub-Judge. Later on, the decree-holder applied to the District Judge (new style) for transfer of certificate for execution of the decree. The District Judge issued the certificate and on the basis thereof an execution application was presented.

Held, that the transfer certificate was issued by a Court which was not the representative of the Court which originally passed the decree. Hence, the application for execution was not competent as the transfer certificate had not been granted by the proper Court. (*Bhide, J.*) LYALLPUR BANK, LTD. *v.* JAI GOPAL. **190 I.C. 146=A.I.R. 1940 Lah. 97.**

———*Application for—Dismissal in consequence of stay order of Court which passed decree—If final disposal—Surety for judgment-debtor—Undertaking to produce judgment-debtor till disposal of application—If discharged by such dismissal—Subsequent application to revive prior application—Liability of surety.*

Where the executing Court dismisses an execution petition, not for any default of the decree-holder, but because there has been a stay order from the Court which passed the decree, and because the executing Court is not willing to keep the petition on file indefinitely, the dismissal is not an order of disposal of the petition, especially when the executing Court also says that the petition may be renewed after the stay order is vacated. It is merely an order adjourning the petition *sine die,* and a subsequent petition for execution filed after the cancellation of the stay order is not a separate application but one to revive the old or prior petition. A surety who secures the release of an arrested judgment-debtor by undertaking to produce the judgment-debtor whenever called upon by the Court until the execution petition is finally disposed, cannot claim to be discharged from his liability on such a dismissal of the execution petition; he continues liable, and his liability can be enforced in the subsequent application for revival. (*Mockett and Horwill, JJ.*) ANNAMALAI CHETTIAR *v.* V. T. CHETTIAR FIRM. **173 I.C. 579=10 R.M. 613=1937 M.W.N. 348=46 L.W. 350=A.I.R. 1937 Mad. 721.**

Appropriation of payment.

———Appropriation of payments—Sums received by way of rateable distribution—If go in discharge of whole decree debt including costs—Right of decree-holder to appropriate towards decree amount excluding costs. *See* C.P. CODE, S. 73. **1938 M.W.N. 1210.**

Attachment.

———*Attachment—Amount due—Life Assurance certificate—Nominee's right to claim exemption from attachment in execution of decree against deceased certificate holder—Mutual wills.*

When the benefit under a certificate granted to a member by a Life Assurance Company under a mutual benefit scheme is payable to the grantee of the certificate himself when he retires, and in case of his death, to his nominee only if the latter survived the member, and when the member himself under the rules of the company has a right to remove or change his nominee, the nominee has no vested right or interest in the benefit. If the member dies before receiving payment of the amount due under the certicate, the amount is an asset of the deceased, he having dominion over it at the time of his death. The amount can therefore be attached in execution of a decree against the deceased member and the nominee under the certificate cannot claim the amount as belonging to him or her, and thereby claim exemption from attachment. The nomination is neither an assignment nor a trust. Even if the nomination be regarded as a will, it makes no difference, because the member would have the power to revoke the will on giving notice to the nominee. Where two persons each having a certificate of his own, nominate the other as nominee under their respective certificates, the nominees cannot get any vested interest on the analogy of reciprocal wills, because even if it be regarded as a case of mutual wills, the members have the power of revoking the will provided they give notice to the nominees. (*Srinivasa Rao, J.*) VENKATAMMA *v.* NANJUNDAPPA. **14 Mys.L.J. 61=40 Mys. H.C.R. 462.**

———*Attachment—Attachment of property before judgment—Compromise decree passed with*

order that attachment should continue till full payment—Subsisting attachment—Onus.

Where certain property was purchased by the decree-holder in execution of his money decree against a certain person but the same property was attached by him before judgment in his suit and the suit was compromised and an order was passed by the Court that attachment should continue till full payment.

Held, that the attachment having been ordered and a report having been submitted that the order had been complied with, it must be assumed that there was a proper and subsisting attachment when the property was sold, especially in view of the subsequent order that the attachment should be continued. The burden of proving that there was no subsisting attachment at the time of sale would be on those who allege that a valid attachment had not taken place. (*Jai Lal, J.*) MUL RAJ *v.* OFFICIAL RECEIVER, JHELUM. **174 I.C. 668=10 R.L. 572=A.I.R. 1937 Lah. 297.**

———*Attachment—Decree-holder attaching crop of judgment-debtor on land of third person—If bound by terms of tenancy.*

A judgment-creditor can in execution attach and bring to sale only the right, title and interest of his judgment-debtor in the property against which process in execution is issued at his instance. He obtains by the warrant of attachment the right to bring to sale the property of his judgment-debtor subject to all restrictions and equities which were binding on that property in the hands of his judgment-debtor. He is just as much bound by those equities as was his judgment-debtor and it matters not whether he has knowledge thereof or not. Consequently where a judgment-creditor attaches crop grown by his judgment-debtor on the land of a third person he is bound by the terms of the tenancy agreement between his judgment-debtor and that third person, whether he has knowledge thereof or not. (*Roberts, C. J. and Dunkley, J.*) U PO HLA *v.* KO PO SWAT. **1938 Rang. L.R. 137=176 I.C. 512=11 R.R. 51=A.I.R. 1938 Rang. 140.**

———*Attachment—Effect of—Sale in execution—Effect on attachment.*

Where in execution property is attached and subsequently sold, the attachment itself ceases and the attaching decree-holder cannot claim any right on the basis of such attachment. (*Stone, C.J. and Nyogi, J.*) AMARDAS *v.* JAILALSAO. **I.L.R. (1936) Nag. 127=165 I.C. 939 (1)=9 R.N. 111 (1)=A.I.R. 1936 Nag. 209.**

———*Attachment — Necessity — Decree — Hypothecation of immovables offered by judgment-debtor as security for satisfaction of decree —Sale without attachment—Validity.*

Where immovable properties are the subject-matter of a security bond executed by the judgment-debtor hypothecating those very properties for the satisfaction of an instalment decree passed in a suit, the decree-holder may proceed to sell all the hypothecated properties without taking out attachment of the properties. (*Rowland and Chatterji, JJ.*) LALITA PRASAD CHAUDHURY *v.* SYED MUHAMMAD MANSOOR. **20 Pat.L.T. 924=18 Pat. 719.**

———*Attachment—Notice prior to—Necessity—Decree against minor—Death of guardian* ad litem—*Execution without fresh guardian in ignorance of death of guardian—Attachment—If void.*

A decree was passed against a minor represented by a guardian. The guardian died but execution was taken in ignorance of such death and property of minor was attached without execution going further.

Held, that no notice was necessary before making the attachment as the minor was not prejudiced by such order. (*Pollock, J.*) PRALHAD PUNDALIK *v.* MOHANLAL BHAWANILAL. **A.I.R. 1936 Nag. 77.**

Benamidar.

———*Benamidar—Decree obtained by—Right of true owner to execute.*

The true owner, if he can prove that the decree-holder is his *benamidar*, is entitled to execute the decree. (*Panckridge, J.*) PRADOSH CHANDRA BASU *v.* HUGH GORDON. **I.L.R. (1938) 1 Cal. 692.**

———*Benamidar*—Locus standi *in execution proceedings.*

A decree can be executed only by a decree-holder, who is defined in S. 2 (3), C.P. Code, subject to this that the transferee of the decree can apply under O. 21, R. 16, to be allowed to execute the decree. In execution proceedings benamidars are not ordinarily recognized. If *X* advances money to *A* in order that *A* may advance it to *B X* does not thereby obtain any rights in the bond that may be executed by *B* in favour of *A*. A person by advancing money for a mortgage does not become a mortgagee, nor does he become a decree-holder in the decree passed in the mortgage suit. If he wishes to have the rights of the mortgagee or decree-holder, he should see that his name is entered in the mortgage-deed or that he is joined as a party in the mortgage suit. He has no interest in the decree and has therefore no right to object to the attachment of such a decree by another. (*Pollock, J.*) GHANSHYAM DAS BALKISAN *v.* SHEO KISAN DAS. **I.L.R. (1937) Nag. 82=167 I.C. 502=9 R.N. 189=A.I.R. 1937 Nag. 30.**

Compromise.

———Compromise—Compromise decree—Registration of—Court if can consider the question of. *See* EXECUTING COURT, *infra*. **A.I.R. 1937 All. 282.**

———Compromise—Compromise decree for an amount exceeding the pecuniary jurisdiction of the Court—Executing Court, if can go behind. *See* EXECUTING COURT, *infra*. **A.I.R. 1937 Oudh 379.**

———*Compromise—Effect of.*

A judgment-debtor is always entitled to resist execution on the basis of a compromise if the compromise is binding on the decree-holder and has the effect of barring execution. (*Harries, C. J. and Dhavle, J.*) BUXAR CENTRAL CO-OPERATIVE BANK, LTD. *v.* AKHOURI BINDHYACHAL PRASAD. **185 I.C. 606=6 B.R. 222=12 R.P. 387=21 P.L.T. 173=A.I.R. 1940 Pat. 261.**

———*Compromise—Effect of—Facilities given to judgment-debtor for paying decretal amount—Decree, if extinguished.*

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Where under a compromise between the decree-holder and the judgment-debtor, the latter is given certain facilities to enable him to pay off the decretal amount, the decree is not extinguished by the compromise and it continues to be executable. (*Abdul Qayoom, C.J. and Wazir, J.*) SHAMBU NATH *v.* MURLI MAL. **42 P.L.R.J.& K. 99.**

———*Compromise—Executing Court—Duty to record.*

The Executing Court is bound to record a compromise between the parties and the question whether such compromise extinguishes the decree or whether it does not intend to extinguish the decree, is entirely beside the question as to whether or not the Court has jurisdiction to record it. (*Dalip Singh and Skemp, JJ.*) AMIR CHAND *v.* DES RAJ. **176 I.C. 813=11 R.L. 238 =A.I.R. 1938 Lah. 69.**

———*Compromise—Parties to decree entering into fresh arrangement—Decree, if extinguished.*

An executing Court has no power to alter or vary a decree. But the parties are always at liberty to make fresh contracts between themselves. Where during the execution proceedings, the parties enter into a compromise by which they agree to make a fresh arrangement for the payment of the debt, and the Court consigns the execution application to the record room in full satisfaction of the decree the decree becomes extinguished and an application for execution of that decree is incompetent. (*Abdul Quyoom, C.J. and Kichlu, J.*) RAM CHAND *v.* RAM CHAND. **39 P.L.R.J. & K. 75.**

Costs.

———Costs—Decree for redemption of Malabar kanom—Execution application for delivery of possession—Costs of—Liability of defendant-mortgagee for. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, S. 5. **1937 M.W. N. 954.**

———*Death of decree-holder—Right of legal representative to continue execution.*

Where a decree-holder dies pending execution proceedings, his legal representative can get his name substituted and continue the execution. No fresh application is necessary. (*Abdul Qayoom, C.J. and Wazir, J.*) CHUNNI LAL *v.* WAZIR ASU RAM. **42 P.L.R.J. & K. 237.**

Delivery of Possession.

———*Delivery of possession—Property in direct possession of judgment-debtor—Mode of delivery—Actual possession and symbolical possession—Distinction, if any—Delivery by proclamation—Effect of.*

The distinction between actual possession and symbolical possession is a distinction without a difference when the question arises between the parties to the delivery of possession. Such a distinction has absolutely no place in the Code of Civil Procedure. But the mode of delivery will vary naturally according to the nature of the property delivered. In case of property in actual physical occupation of the judgment-debtor, *e.g.*, a house in which he actually resides, he must be dispossessed of it by being bodily removed from it and the decree-holder or purchaser must be put

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in physical occupation of it. If the property is a zamindari or a tank or mineral rights in direct possession of the judgment-debtor the judgment-debtor cannot be physically removed from it, though delivery would be by outtinng him. What the Amin or bailiff does is to go to the proper ty and to proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. But this is not symbolical possession. It is actual possession and is as effective against the judgment-debtor as his physical removal from a house. Regarding third parties, however the matter stands on a different footing. (*Noor, J.*) RAJENDRA NARAYAN BHANJ DEO *v.* CHINTAMONI MAHAPATRA. **180 I.C. 322 =5 B.R. 585=11 R.P. 493=40 Cr.L.J. 339 =20 P.L.T. 333=1938 P.W.N. 526=19 Pat. L.T. 632=A.I.R. 1939 Pat. 151.**

Equitable execution.

———*Equitable execution — Appointment of Receiver—Property not saleable in execution—Powers of Court of equity.*

Courts of equity have always been willing to assist a creditor who cannot get paid and who is unable to enforce legal execution because of some peculiarity in the property sought to be attached. Where a difficulty of that sort exists, a Court of equity would appoint a receiver. But Courts of equity have always refused to allow their jurisdiction to be invoked in order to render property attachable which is not attachable at law. (*Beaumont, C.J. and Divatia, J.*) HARILAL CHHOTALAL *v.* CHATURBHAI. **165 I.C. 604=9 R.B. 157 =38 Bom.L.R. 938=A.I.R. 1936 Bom. 390.**

Executability of decree.

———Executability of decree—Agreement subsequent to decree as to mode of payment. *See* CONTRACT—NOVATION. **39 P.L.R.J. & K. 171.**

———Executability of decree—Decree varied by agreement—Substituted decree—Execution of. *See* C.P. CODE, O. 21, R. 2. **A.I.R. 1937 Sind 229 and A.I.R. 1937 Cal. 222.**

———*Executability of decree—If lost by subsequent decree between parties—Decree not varied or reversed in any respect—Executability of.*

A decision in a subsequent suit does not necessarily have the effect of varying or reversing the original decree. It may affect the rights of the parties; but that is because the new decree gives them fresh rights which must be worked out in the ordinary way in execution of that decree. The rights and liabilities which have been finally decided in another suit cannot be impliedly affected by a subsequent decision which makes no reference whatever to them and about which the parties were never at issue. The decree-holder, therefore, has a right to execute a decree which has never been varied or reversed by a subsequent decree in another suit between the same parties, so long as it stands. (*Bose, J.*) NARAYAN SAMBHAJI *v.* MST. RADHABAI. **I.L.R. (1937) Nag. 153=169 I.C. 311=9 R.N. 319= A.I.R. 1937 Nag. 151.**

Executing Court.

———Executing Court—Award against firm—Execution—Liability of legal representative of deceased partner—If can be raised and decided. *See* C. P. CODE, O. 21 R. 50 (2). **30 S.L.R. 6.**

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———*Executing Court—Duty of.*

The duty of an executing Court is to execute a decree as it stands, whether right or wrong, unless the decree is passed without jurisdiction. (*Courtney-Terrel, C.J. and Manohar Lall, J.*) CHHUNI LAL *v.* SIA CHAUDHURY. **172 I.C. 125=10 R.P. 281=A.I.R. 1937 Pat. 618.**

———*Executing Court—Duty of—Decree for ejectment of tenant—Decree-holder ceasing to be landholder—Effect.*

When a decree for ejectment of tenant becomes incapable of execution in respect of certain plots of land covered by the decree, as the decree-holder is no longer the landholder in respct of such plots, he cannot execute it by ejecting some one else's tenant. But that is no reason why the decree should not be executed in the manner desired by him to the extent that such execution is possible. (*Drake-Brockman, S.M. and Knox, J.M.*) SUBHEDAR JIWAN *v.* RAM SARUP. **1936 R.D. 387 (1).**

———*Executing Court—Duty of—Duty to aid decree-holder—Rules of procedure—Objects of.*

Rules of procedure are handmaids to justice and ought not to be used for obstructing justice. It is the duty of the Court executing a decree to aid the decree-holder in realising the amount due on his decree. A decree-holder applied for attachment of the movables of the judgment-debtor in the first instance, and if the money was not so realised for sale of the defaulting tenure. As during pendency of the application certain moneys due to the judgment-debtor were deposited in the Court the decree-holder applied for attachment of the money. As the Court said that the decree-holder could not be given the attachment of the money until the writ issued for attachment of the movable was recalled, the decree-holder applied for recalling the writ and it was accordingly recalled. But the Court, taking the ground that there was no prayer in the application for execution for attachment of the moneys, dismissed it and the amount was withdrawn by the judgment-debtor.

Held, that the order was not justified. The Court ought to have aided the decree-holder in realising the money due on his decrees, and should not have enabled the judgment-debtor to take away the money. The Court could have allowed the decree-holder to add a prayer for the attachment of the moneys. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SINGH *v.* MAFIZUDDIN CHOWDHURY. **162 I.C. 707=8 R.C. 638=A.I.R. 1936 Cal. 238.**

———Executing Court—Duty of—Mortgage suit—Final decree for sale at variance with preliminary decree—Mode of execution—Which decree to prevail—Failure to objects to final decree and to execution therefore—Subsequent objection after confirmation of sale—Competency. *See* C. P. CODE, O. 34, R. 5. **1938 P.W.N. 776.**

———*Executing Court — Jurisdiction—Determination of—Value of suit or amount of decree.*

It is the value of the suit and not the amount of the decree which determines the jurisdiction of the executing Court. (*Abdul Qayoom, C.J. and Kichlu, J.*) KAMAL DARZI *v.* RASOOL SHEIKH. **42 P.L.R.J. & K. 93.**

———*Executing Court—Law applicable—Court passing decree governed by special law of limitation—Sending decree for execution to Court where that law not applicable—Execution governed by special law.*

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Obiter—Where the Court which passed a decree is governed by a special law of limitation and it sends a decree for execution to another Court where that law of limitation does not apply, the execution proceedings are nevertheless governed by the special law of limitation. Therefore, where a decree is barred by time according to the law, when it was transferred to the executing Court, the bar cannot be removed on the ground that the decree is not barred according to the law of limitation in force in the executing Court. (*Mahomed Noor and Saunders, JJ.*) JOKHIRAM SAGARMAL *v.* CHAMAN CHOUDHRY. **15 Pat. 356=160 I.C. 1096=8 R.P. 420=17 Pat.L.T. 57=A.I.R. 1936 Pat. 104.**

———*Executing Court—Order "Striking off" application—Propriety of—Proper procedure.*

The phrase "strike off" is really meaningless and leads to endless litigation. If an executing Court wants to dispose finally of an application, it should use clear and unambiguous language such as "the application is dismissed". "Striking off an application" is capable of a number of meaning and should not be used. (*Harries, C.J. and Manohar Lall, J.*) MAHARAJA PRATAP UDAI NATH SHAH DEO *v.* SUKHDEO PRASAD BHAGAT. **18 Pat. 649=186 I.C. 291=6 B.R. 324=12 R.P. 481=A.I.R. 1940 Pat. 54.**

———Executing Court—Powers of—Account suit—Final decree for amount in excess of Court's pecuniary jurisdiction—Objection in execution—Maintainability. *See* SUITS VALUATION ACT, S. 8. **41 C.W.N. 851.**

———*Executing Court—Powers of—Agreement by decree-holder to accept smaller sum if paid within fixed period—On default decree-holder to proceed with execution and judgment-debtor not to raise objection—Time—If of essence of contract—Power of executing Court to extend payment and to grant relief to judgment-debtor—Equity—When can be invoked.*

Where a decree-holder agrees to accept in full satisfaction of his decree a smaller sum than the decree amount if paid within a stipulated time, and that if that sum be not paid within time he is to proceed with the execution without the judgment-debtor being competent to raise any objection, the parties must be taken to have intended that time was of the essence of the contract. The executing Court has no power under such circumstances to extend the time for payment without the consent of the decree-holder. A Court of Equity will refuse to aid a defaulter if a forfeiture is wilful or is the result of gross negligence. Equity only interferes to do complete justice between the parties. (*Dhavle and Rowland, JJ.*) KISSEN GOPAL GANWARIWALA *v.* MADAN LAL. **16 Pat. 395=171 I.C. 668=1937 P.W.N. 606=10 R. P. 228=18 Pat.L.T. 672=A.I.R. 1937 Patna 542.**

———Executing Court—Powers of — Assignment of decree recognised after notice to judgment-debtor—Latter failing to appear and object—Subsequent objection at later stage—Competency—Executing Court going into plea and finding assignment collusive—Sustainability. *See* C. P. CODE, S. 11. **40 C.W.N. 1393.**

———*Executing Court—Powers of — Decree against all defendants—Execution against one of them personally.*

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Where a decree, as it stands, is against all the defendants, it is capable of being executed against their property whatever the nature of it, or against the defendants personally, and an executing Court cannot go behind the decree. 34 Bom.L.R. 941, Appr. (*Addison and Din Mohammad, JJ.*) GANESH DAS *v.* HARI CHAND. **17 Lah. 187=164 I.C. 378=9 R.L. 113 (1)=38 P.L.R. 430=A.I.R. 1936 Lah. 704.**

———*Executing Court—Powers of — Decree against minor—Objection that guardian's interest was adverse to minor—If can be raised.*

It is against public policy and good sense alike that the Court charged with the execution of a decree should be allowed to question its validity; where the objection to the execution of the decree is that the interest of the guardian *al litem* of a minor defendant was adverse to that of the minor, the objection cannot be raised in execution. (*Venkatasubba Rao and Menon, JJ.*) KRISHNAMURTHI *v.* IMPERIAL BANK OF INDIA. **59 Mad. 642=164 I.C. 472=9 R.M. 124=44 L.W. 396=1936 M.W.N. 561=A.I.R. 1936 Mad. 618=71 M.L.J. 209.**

———*Executing Court — Power of — Decree against unrepresented minor—Power of Court to go behind decree.*

A decree obtained against an unrepresented minor is a nullity and if it is brought to the notice of an executing Court that the decree sought to be executed was obtained against a judgment-debtor when he was a minor and was not represented by guardian *ad litem*, it is necessary for it before it executes the decree to determine whether there is a decree which can be executed. The rule is that an executing Court can go behind a void decree. (*Addison and Din Mahomed, JJ.*) PIR TAJ-UD-DIN *v.* KHAMBATTA. **179 I.C. 146=11 R.L. 536=40 P.L.R. 857=A.I.R. 1938 Lah. 515.**

———Executing Court—Powers of—Decree in contravention of S. 6 (*b*) of Santal Parganas Settlement Regulation—Execution—If can be refused. *See* SANTAL PARGANAS SETTLEMENT REGULATION, S. 6 (*b*). **1938 P.W.N. 617..**

———*Executing Court—Powers of—Decree passed without jurisdiction.*

A decree, though passed without jurisdiction, unless it is set aside by proper remedies, is binding on the executing Court. (*Jai Lal, J.*) COMMITTEE OF MANAGEMENT FOR GURDWARAS, AMRITSAR *v.* CENTRAL BANK OF INDIA, LTD., AMRITSAR. **166 I.C. 143=9 R.L. 343=A.I.R. 1936 Lah. 766.**

———*Executing Court—Powers of—Decree silent as to interest—Claim by decree-holder to interest on basis of agreement by judgment-debtor to pay interest—Denial of agreement—Enquiry into alleged agreement—Power of executing Court—Denial of liability for interest—Estoppel.*

When the decree contains no provision for interest, the Court executing the decree cannot be compelled to hold an enquiry into an alleged agreement by the judgment-debtor to pay interest in execution, when the judgment-debtor denies the agreement. That will be asking the executing Court to modify the decree, which the executing Court has no power to do. There is also no estoppel by conduct operating against the judgment-debtor preventing him from denying his liability for interest. When the agreement to pay interest is itself denied, there is no room for estoppel.

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Till the agreement is established the question of estoppel cannot arise. (*Burn and Lakshmana Rao, JJ.*) VENKATARAMA DASS *v.* VENKATARAMANAYYA. **1936 M.W.N. 1375=167 I.C. 236 (1)=9 R.M. 439=44 L.W. 744=A.I.R. 1937 Mad. 109=71 M.L.J. 747..**

———*Executing Court—Powers of—Decree under S. 48-D, Bengal Tenancy Act, without preliminary order—Refusal to execute as not in conformity with S. 48-D—Legality.*

Where a decree under S. 48-D of the Bengal Tenancy Act, is not drawn up in proper form, *i.e.*, after a preliminary order as required by that section, it only amounts to an irregularity, and there is no question of want of jurisdiction of the Court which had passed the decree. The executing Court to which it is sent for execution cannot go behind it or refuse to execute it on the ground of such irregularity. (*R. C. Mitter, J.*) SUBAL CHANDRA JANA *v.* SURENDRA NATH BERA. **40 C.W.N. 1293.**

———*Executing Court—Powers of—Executability of decree—Compromise decree compulsorily registrable not registered.*

Where a compromise decree affecting immovable property is sought to be executed, the Court can take cognizance of the question whether the decree is compulsorily registrable under S. 17 (2) (*vi*) of the Registration Act and whether in the absence of registration it does not affect the property affected by it. If the Court arrives at the conclusion that for want of registration the decree does not affect the immovable property which the decree-holder seeks to recover in execution of the decree, the Court must declare that the decree is not capable of execution. In doing so, the Court cannot be said to be going behind the decree. (*Niamatullah, J.*) ATAAT HUSAIN *v.* MUSHTAQ ALI. **168 I.C. 642=9 R.A. 660=1937 A.L.R. 385=1937 A.L.J. 120=1937 A.W.R. 22=A.I.R. 1937 All. 282.**

———*Executing Court—Powers of—Execution of award under Co-operative Societies Act—Court, if can question its validity.*

An executing Court has no jurisdiction to question the validity of the decree sought to be executed. The same rule applies to awards under the Co-operative Societies Act. If the award is invalid for any defect in procedure a person may possibly be able to get it declared invalid as against him by resorting to proper remedies, but the point cannot be raised in executing Court. (*Bhide, J.*) ABDUL AZIZ *v.* ANJUMAN IMDAD BAHMI KARZA. **163 I.C. 278=9 R.L. 2=38 P.L.R. 698=A.I.R. 1936 Lah. 442.**

———*Executing Court — Powers — Extraneous matter included in decree—Power to execute.*

If once extraneous matters are allowed to be included in a decree without any objection on the part of the defendant, the executing Court cannot refuse to execute that part of the decree on the ground that it was extraneous to the subject-matter of the suit. The defendant has a right to appeal against the decree thus drawn up and have that portion excluded. But if he does not take any such action in the matter, he cannot be allowed to avoid that part of the decree merely on the ground of its being inoperative. (*Din Mahomed, J.*) MUSHARAF HUSSAIN *v.* MUNAWAR ALI KHAN. **186 I.C. 881=12 R.L. 436=A.I.R. 1940 Lah. 7.**

———Executing Court—Powers of—If can question validity, legality or correctness of decree. *See* MYSORE CIVIL PROCEDURE CODE REGULATION, S. 11, O. 2, R. 2 AND O. 34, R. 14. **42 Mys.H.C. R. 452.**

———*Executing Court—Powers of—Interpretation of decree.*

It is a well-settled principle that if the decree is ambiguous in any respect, it is open to the Court of execution to find out the real meaning of the decree by a reference to the judgment and the pleadings in the case. (*Mitter and Sen, JJ.*) MANAGER, DACCA NAWAB WARDS ESTATE *v.* ANANGA MOHAN ROY CHOWDHURY. **43 C.W.N. 1078.**

———*Executing Court—Powers of—Jurisdiction of Court that passed decree—Enquiry into.*

An executing Court must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree; for, that point settles the question as to whether there is an existing decree upon which the executing Court can take action. A.I.R. 1925 C. 907, (F.B.) Foll. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **182 I.C. 785=12 R.L. 68=A.I.R. 1938 Lah. 129.**

———*Executing Court—Powers of—Jurisdiction of Court that passed decree—Power to question.*

The executing Court is entitled to refuse to execute a decree on the ground that it was made without jurisdiction, although the want of jurisdiction is not apparent on the face of the decree and it is necessary to prove other facts for the purpose of establishing it. (*Mukheriea, J.*) BISWANATH LAHIRI *v.* THE CHATRA SERAMPUR CO-OPERATIVE CREDIT SOCIETY, LTD. **41 C.W.N. 887.**

———*Executing Court—Powers of—Land belonging to member of agricultural tribe.*

The executing Court has no jurisdiction to refuse execution on the ground that the judgment-debtor will not have any land left for his maintenance. Where a decree-holder applied for lease of judgment-debtor's land for 20 years in satisfaction of his decree,

Held, the executing Court has no jurisdiction to refuse to lease the land on the ground that the land left with the judgment-debtor was not sufficient for his maintenance. (*Bhide, J.*) GURDIT SINGH *v.* SHER KHAN. **164 I C. 30=9 R.L. 105 =38 P L.R 608=A.I.R. 1936 Lah. 448.**

———*Executing Court—Powers of—Mortgage decree—Objection to jurisdiction of Court that passed decree.*

An omission by a judgment-debtor to take an objection as to jurisdiction of Court to pass a decree in a mortgage suit during trial or before the preliminary decree for sale is made absolute, does not preclude him from raising an objection to delivery of possession of the property in execution of the decree passed against him on the ground that the Court which passed the decree and held the sale had no inherent jurisdiction to

entertain the suit. (*Subhedar, Niyogi and Staples, A.J.Cs.*) MURLIDHAR SHRINIVAS *v.* GORAKHRAM SADHURAM. **31 N.L.R. (Supp.) 57=161 I. C. 877=8 R.N. 252=A.I.R. 1936 Nag. 1 (F.B.).**

———*Executing Court—Powers of—Mortgage decree for sale—Execution—Plea that property is inalienable temple service inam — Denial of inalienable character by decree-holder —Power of executing Court to entertain and enquire into plea.*

When there is a final decree for sale of mortgaged property, it is not permissible to the executing Court to inquire into a plea raised by the judgment-debtor that the property in question is not liable to be sold in execution on the ground that it is a temple service inam and therefore inalienable when the allegation as to the property being inalienable temple service inam is denied by the decree-holder and when there is nothing apparent on the face of the proceedings to show that the property is inalienable, especially when there is no provision of statute law forbidding the sale. The executing Court has no power to go into disputed questions of fact, which if proved, would take away its jurisdiction to order sale. (*Burn and Lakshmana Rao. JJ.*) ANNAMALAI CHETTIAR *v.* KUMARAPPAN SRIRANGA CHARIAR. **I.L.R (1937) Mad. 329=168 I.C 103 =9 R.M. 528=1936 M.W.N. 1352=44 L.W. 795 =A.I.R. 1937 Mad 134=71 M.L.J. 867.**

———*Executing Court—Power of— Mortgage-decree—Order of sale—If can prescribe.*

A court executing a decree for sale passed on the basis of a mortgage has full discretion to prescribe the order in which the various items of the properties directed to be sold by that decree, are to be sold, provided it is necessary to do so with a view to adjust the equities arising between two subsequent transferees from the mortgagor or with a view to protect the rights of a subsequent transferee and further provided that the order so prescribed has not the effect of prejudicing the rights of the mortgagee to realise the whole of his decree amounts. Where it was not a subsequent transferee from a mortgagor who invoked the assistance of the Court for protection his interest in some of the items of the mortgaged property, but it was a legal representative of the mortgagor who in effect sought the specific performance of an agreement entered into between him and his transferee for payment of a portion of the amount due in respect of the decree, it was *held*, that there was nothing to justify the Court to accede to such a request to fetter the rights of the decree-holder by laying down the order in which the properties are mortgaged are to be sold. (*Iqbal Ahmad and Varma, JJ.*) KARIMUL RAHMAN KHAN *v.* SARASWATI SUGAR SYNDICATE, LAHORE, **I.L.R (1939) All. 150=182 I.C 493=12 R.A. 23=1939 A.L.J 53 =1939 A.W.R. (H.C.) 17=A.I.R. 1939 All. 314.**

———Executing Court—Powers of—Objection that decree is nullity and that property directed to be sold is non-saleable—Power to deal with. *See* C. P. CODE REGULATION, S. 47. **14 Mys. L.J. 226.**

———*Executing Court—Powers of—Objection that decree was passed without jurisdiction—In-*

vestigation necessary to determine its validity—Power of Court to entertain objection.

When a decree for Rs. 1,147 passed by a Munsif was presented for execution, objection was taken by the judgment-debtor that the decree was passed without jurisdiction as the Munsif had no power to try a suit above Rs 1,000,

Held, that it was impossible to say whether the Munsif had jurisdiction to make the decree without going into evidence, as it might be that he was specially empowered, and that as an investigation of some kind had to be made in order to determine whether the objection had any substance or not, it was not open to the executing Court to entertain the objection. (*Henderson, J.*) PIROZEPUR LOAN CO., LTD. *v.* PROMODA KANTA BASU. **44 C.W.N. 392.**

——Executing Court—Powers of—Order transferring decree to Small Cause Court for execution—Validity of — Jurisdiction of executing Court to question on ground of want of jurisdiction to execute. *See* C. P. CODE, O. 21, R. 4. **40 C.W.N. 267.**

——Executing Court — Powers of — Penal clause in decree—Relief against. *See* CONTRACT ACT, S. 74. **A.I.R. 1938 Sind 185.**

——*Executing Court — Powers of —Plea of benami—Jurisdiction to inquire into.*

It cannot be laid down as a universal rule that it is not open to a Court in execution to inquire into questions of *benami* and adjust the rights of parties according to its findings. It may be sound policy to discourage *benami* transactions in general; but unless statutorily bound, the Court must continue to do its duty of unravelling the truth, however cleverly hidden by false or frivolous trappings, and administer justice according to the true rights of the parties such as they may be found to be on inquiry. (*King and Krishnaswami Ayyangar, JJ.*) MINAKSHI IYER *v.* NOOR MUHAMMAD ROWTHER. **I L.R. (1939) Mad. 1004=183 I C. 699=12 R M. 362=1938 M W N. 1230=48 L W 870=A.I.R. 1939 Mad. 210 =(1939) 1 M.L.J 379.**

——Executing Court—Powers of—Power of transferee Court to question jurisdiction of Court which passed decree. *See* C. P. CODE, O. 21, R. 7, **38 Bom.L.R. 1023**

——Executing Court—Powers of—Power to allow amendment of application for execution not properly made within 12 years of decree. *See* C. P. CODE, S. 48. **1939 M.W.N. 988.**

——*Executing Court—Powers of—Power to go behind decree.*

An executing Court has no right to go behind the decree or in any way to add to or amend the terms thereof. It has to execute the decree as it stands, and any amendment thereof can be made only by the Court which passed the decree. It is however the duty of the executing Court to ascertain the property which is the subject of the decree and for this purpose it is entitled to look at the paramount description of the property and abide by it. (*Fazl Ali and Agarwala, JJ.*) MATIUR RAHMAN KHAN *v.* SONU LAL. **4 B.R. 507=175 I.C. 47=10 R.P. 567=A.I.R. 1938 Pat. 195.**

——*Executing Court—Powers of—Power to go behind decree.*

The executing Court is competent to go behind the decree and refuse to execute if the Court, which passed the decree, had apparently no jurisdiction either territorial or pecuniary or in respect of the person of the judgment-debtor. But where a suit started against a dead person was given up and his son was made a party defendant and the plaint amended making the suit as against him alone and seeking relief to the extent of the assets of his deceased father in his hands and a consent decree was passed.

Held, that the suit was not against a dead person, that the Court had jurisdiction to pass the decree and that the son could not challenge it in execution. (*Mukherjea, J.*) TULSI MONI DASI *v.* SUBHAS CHANDRA PRAMANIK. **177 I.C. 340= 11 R C. 231=A.I.R. 1938 Cal 575.**

——*Executing Court—Powers of—Power to go behind decree.*

Every decree, order or judgment, however erroneous, carries with it an initial presumption of validity until and unless set aside or declared to be of no effect. It is not, therefore, open to the Executing Court to go behind it. (*Nawal Kishore, C.J.*) DAMODARADAS *v.* BALKISHEN. **1939 M L.R. 79 (Civ.).**

——*Executing Court—Powers of—Power to go behind decree.*

Where the decree itself provides for the attachment of half the salary of the judgment-debtor, the Executing Court cannot refuse to attach the salary on the ground that the attachment is opposed to S. 60, C. P. Code. (*Bhide, J.*) RAJINDAR KUMAR *v.* CHETAN LAL. **188 I C. 639 =13 R.L. 35=41 P.L.R. 834=A.I.R. 1940 Lah. 65.**

——*Executing Court—Powers of—Power to go behind decree—Award against Co-operative Society—Power to decide validity of.*

Where an award against a Co-operative Society made under the Co-operative Societies Act is sent to the Civil Court for execution, the executing Court cannot go behind the award and decide whether the award is properly framed or not. It can only look at the award to see who is made liable under the award. (*Stone, C.J. and Niyogi, J.*) SHREELAL MALGUZAR *v.* CENTRAL CO-OPERATIVE BANK OF PIPARIA. **20 N.L.J. 6.**

——*Executing Court—Powers of - Power to go behind decree—Award filed in Court—Power to question validity.*

An executing Court can enquire into and decide that a decree is a nullity not on the ground of jurisdiction but because the decree passed is not a decree at all, such as in the case of a decree against a person who is dead, or is a decree in arbitration proceedings under the Arbitration Act which is no decree at all. An executing Court cannot go behind an award filed in Court with consent of the parties and question its validity when on the face of it, it is not a nullity, even if the Court filing it had no territorial jurisdiction. (*Davis, C.J. and Lobo, J.*) SHINGOMAL *v.* KHUSHALDAS FIRM. **A.I.R. 1940 Sind 150.**

——*Executing Court—Powers of—Power to go behind decree—Compromise decree passed by Court for amount exceeding its pecuniary jurisdiction.*

The mere fact that a compromise decree was passed by a Court for an amount exceeding its pecuniary jurisdiction does not cause the decree to be a nullity so as to justify the executing

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Court going behind it. (*Thomas and Zia-ul-Hasan, JJ.*) GWALA PRASAD KHANNA *v* MATHURA PRASAD. 13 Luck. 340=168 I.C. 625=9 R.O. 492=1937 O.L.R. 295=1937 O.W.N. 686=A.I.R. 1937 Oudh 379

——Executing Court—Powers of—Power to go behind decree—Decree for eviction under Malabar Compensation for Tenants' Improvements Act—Award of compensation on basis of valuation made three years prior to decree—Decree silent as to date of valuation or as to re-valuation—Re-valuation in execution from date of valuation to date of eviction—Permissibility. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, S. 6 (3). 71 M.L.J. 103.

——Executing Court—Powers of—Power to go behind decree—Decree on unregistered private award. *See* C. P. CODE, SCH. II, PARA. 20. 43 C.W.N. 602.

——*Executing Court—Powers of—Power to go behind decree—Decree passed against person as executor—Objection by latter in execution on ground that he had ceased to be executor at time of decree.*

The Executing Court would be competent to refuse to execute a decree only when on the face of the decree it would appear that the Court which passed it had no jurisdiction. Consequently an executing Court is not entitled to go behind a decree passed against a person as executor of an estate on his objection in execution proceedings on the ground that he had ceased to function as executor before the institution of the suit in which the decree was passed. (*Mitter and Khundkar, JJ.*) JATINDRA MOHAN BANERJI *v.* RAJALAKSHMI DEBI. 43 C.W.N. 271.

——*Executing Court—Powers of—Power to go behind decree—Objection to jurisdiction to execute decree—Duty of Court to determine—Judgement and concise statement—Relevancy—If can be looked at.*

When an executing Court proceeds to execute a decree it proceeds on the footing of the decree which is transmitted to it for execution. The executing Court has no jurisdiction to go behind the decree to question the jurisdiction of the Court which passed the decree. If, however, a dispute arises as to the jurisdiction of the executing Court to execute the decree, it has to be decided by that decree. When doing so, documents which are part of the proceedings in execution of the decree, *e.g.*, the concise statement and judgment of the Court showing what was the suit, are relevant and can be legitimately looked at. There is nothing in law to prevent the executing Court from looking at such documents to determine its jurisdiction to execute the decree. (*Kania, J.*) RUSTOMJEE SORABJI *v.* MAHADEV CHINTAMAN. I.L.R. (1940) Bom. 633=190 I.C. 394=42 Bom.L.R. 596=A.I.R. 1940 Bom. 277.

——*Executing Court—Powers of—Power to go behind decree—Order that interest shall not run—Jurisdiction to pass.*

An executing Court has no jurisdiction to go behind the decree and pass an order altering the decree so as to stop the running of interest allowed by the decree. (*Pollock, J.*) BHABUTMAL *v.* BALWANTRAO. I.L.R. (1937) Nag. 344=169 I.C. 294=9 R.N. 318=20 N.L.J. 28=A.I.R. 1937 Nag. 120.

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——Executing Court—Powers of—Power to go behind decree—Rule as to—Applicability—Extent of—Mortgage suit—Application for final decree—Objection that mortgage property is not saleable—Power to entertain. *See* C. P. CODE, O. 34, R. 5. 46 L.W. 544.

——Executing Court—Powers of—Power to go behind decree—Suit decreed without contest—Decree good on face of it—Objection in execution that decree is null as being passed in suit barred by S. 69, Partnership Act—Power of executing Court to go into. *See* PARTNERSHIP ACT, SS. 69 AND 74. (1940) 1 M.L.J. 329.

——Executing Court—Powers of—Power to go behind decree—Void and voidable decree—Distinction—Decree, when a nullity—Refusal of execution—When justified. *See* DECREE—VALIDITY. 1939 P.W.N. 631.

——*Executing Court—Powers of—Power to question validity of decree or jurisdiction of Court which passed the decree.*

It is not competent for a Court executing a decree to embark on an inquiry into facts which, if established, would show that the Court which passed the decree had no jurisdiction to pass it. Where the jurisdiction of a Court to pass a decree depends on the existence of certain facts, the executing Court should refuse to take evidence in proof of those facts for the purpose of determining the jurisdiction of the Court which passed the decree. The executing Court has no power to question the validity of the decree which it is called upon to execute. (*Niamatullah, J.*) BRIJ MOHAN DAS *v.* MST. PIARI. I.L.R. (1937) All. 761=1937 A.L.J. 720=1937 R.D. 355=171 I.C. 196=10 R.A. 240=1937 A.L.R. 811=1937 A.W.R. 603=A.I.R. 1937 All. 567.

——*Executing Court—Powers of—Power to question—Validity of decree.*

It is clear law that the executing Court can only question the decree of a Court on the ground of lack of inherent jurisdiction and cannot question it on the ground of illegal exercise of jurisdiction or a material irregularity in the exercise of jurisdiction. (*Dalip Singh.*) ANJUMAN IMDAD QARZA BAHMI *v.* ABDUL GHANI. 189 I.C. 370=13 R.L. 75=42 P.L.R. 126=A.I.R. 1940 Lah. 280.

——Executing Court—Powers of—Power to question validity of decree—Revenue Officer—Power to question validity of ejectment order of Civil Court. *See* C. P. TENANCY ACT, S. 24. 20 N.L.J. 156.

——*Executing Court—Powers of—Power to refuse to execute decree.*

The executing Court can refuse to execute a decree in three circumstances only, that is to say, where the Court which had passed the decree had no territorial jurisdiction or jurisdiction over the person of the defendant, or over the subject-matter, and it is only within these narrow limits the executing Court could refuse to execute the decree. 53 Cal. 166 (F.B.). Foll. (*R. C. Mitter, J.*) SUPAL CHANDRA JANA *v.* SURENDRA NATH BERA. 66 C.L.J. 33.

——*Executing Court—Powers of—Power to refuse execution—Absence of territorial jurisdiction in decretal Court.*

The executing Court would be competent to refuse to execute the decree on the ground of want of territorial jurisdiction in the Court

which passed it, only when on the face of the decree and the papers relevant for the purpose of understanding it, it appears that the Court had no jurisdiction. Where on the other hand there is a clear statement upon the plaint which gives the Court jurisdiction to entertain a suit and upon the basis of that jurisdiction the decree is passed by the Court without there being a challenge by the defendant as regards the territorial jurisdiction of the Court to pass the decree, it is not open to the defendant to question the jurisdiction of the Court after the decree has been made in the course of execution. (*S. K. Ghose and Mitter, JJ.*) RASHBEHARI DAS *v.* MAHINDI PAL **173 I C. 634=10 R C. 551=67 C.L.J 7=41 C.W.N. 1162=A.I R 1937 Cal. 565.**

——*Executing Court—Powers of—Power to vary decree with consent of parties.*

It is not open to the executing Court to alter or vary the decree even with the consent of the parties. (*Abdul Qayoom, C.J. and Janki Nath Wazir, J.*) MADHOLAL DURGA DAS *v.* MOHAMMAD DIN. **39 P.L.R. J & K. 23.**

——*Executing Court—Powers of—Provision in final decree in mortgage suit for sale of particular item to discharge prior mortgage debt—Power of executing Court to question such direction—Executability.*

Where a final decree in a mortgage suit provides for sale of a particular item to discharge the debt due to a defendant under his prior mortgage, in pursuance of a provision in the preliminary decree, whether such a direction is right or wrong is not a question which can be discussed by a Court executing the decree. It cannot be held that the decree is merely declaratory of the rights of that defendant. (*Burn and Lakshmana Rao, JJ.*) VENKATARAMA SASTRI *v.* VENKATANARASIMHAM. **175 I.C. 827=11 R.M. 10=1937 M W N. 1192=46 L.W. 700=A.I.R. 1938 Mad. 144=(1937) 2 M.L.J. 881.**

——*Executing Court—Powers of—Question of territorial or pecuniary jurisdiction of decretal Court—If can be raised.*

S. 11, Suits Valuation Act, and S. 21, C. P, Code, are two legislative exceptions to the general principle of law that where a Court has no jurisdiction, its judgments and orders are mere nullities and can be declared to be void by every Court in which they may be presented. In view of only these exceptions it has been generally held that question of territorial or pecuniary jurisdiction of the decretal Court cannot be raised in execution proceedings before it. (*Middleton, J C and Mir Ahmad. J.*) AMIR KHAN *v.* KHAIR MOHAMMAD. **178 I.C. 275=11 R. Pesh. 50=A.I R. 1938 Pesh. 77.**

——Executing Court—Powers of—Question whether decree is null and void by reason of death of party before hearing of suit—If can be raised and decided. *See* C. P. CODE, S. 47. **182 I. C. 208=5 B.R. 732.**

——Executing Court—Powers of—Reference to arbitration—Power to grant permission and to file award made on arbitration. *See* C. P. CODE, O. 21, R. 2. **42 Bom L.R. 867.**

——Executing Court — Powers of — Relief against penal clause in compromise decree. *See* COMPROMISE—CONSENT-DECREE. **A.I.R. 1937 Nag. 413.**

——*Executing Court—Powers of—Right to refuse to execute decree.*

The executing Court is entitled to refuse to execute a decree on the ground that it was made without jurisdiction. What is necessary, in order to enable the judgment-debtor to raise this objection is that the decree must have been made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person. The executing Court can also refuse even if the want of jurisdiction is not apparent on the face of the decree, and it is necessary to prove any other fact for the purpose of establishing it. But the case is otherwise if a Court assumes jurisdiction upon certain averments made in the pleading which unless they are challenged or shown to be inaccurate, would give the Court jurisdiction to try the suit. The defendant against whom the decree is passed will not be entitled to contradict that statement and say that the averments are false, and hence the assumption of jurisdiction by the Court is illegal, (*Mukherjea J.*) NILMANI LAHIRI *v.* CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY, LTD. **172 I.C. 435=10 R.C. 378=A. I.R. 1937 Cal. 481.**

——Executing Court — Powers of — Set-off apart from O. 21, R. 19—If can be given effect to. *See* C. P. CODE, O. 21, R. 19. **A.I.R. 1936 Cal. 409.**

——*Executing Court—Powers of—When can disregard decree.*

No doubt the executing Court has got to take a decree and execute it as it stands, but the executing Court is not precluded from finding out whether any decree had ever been passed at all; and merely because something has been written in a decree form, it does not necessarily make it a decree. Hence where there is no judgment to support the decree sought to be executed and the decree is something merely written in a decree form, the decree is a complete nullity and the executing Court can disregard it. (*Baguley and Mosely, JJ.*) A.T.N A.T. CHOCKALINGAM CHETTIAR *v.* KO MAUNG GYI. **178 I.C. 544=11 R.R. 242=A.I.R. 1938 Rang. 372.**

——Executing Court—Transfer of decree of Court of Native State to British Indian Court—Objection to jurisdiction of foreign Court to pass decree—Decision by British Indian Court that decree is null as being without jurisdiction—Finality of. *See* C. P. CODE, SS. 13 AND 44. **40 C. W.N. 591.**

——*Executor—Execution against—Attachment of personal property—Permissibility.*

Where an executor is only a debtor in his capacity as an executor, and not personally liable, there is no warrant for attaching his personal banking accounts, unless it is shown that he has been mixing up estate money with his personal property. (*Baguley, J.*) SHEERAZEE *v.* REDDY. **1939 Rang L R. 694=187 I.C. 105=12 R.R. 305 =A I.R. 1940 Rang. 34.**

Instalment decree.

——*Instalment decree—Default—Acceptance of over-due instalment—If waiver of default.*

The mere acceptance of an over-due instalment under an instalment decree does not amount to a waiver. (*Rupchand Bilaram and Dadiba C. Mehta, A.J.Cs.*) GUNOMAL *v.* LALOMAL. **31 S.**

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L.R. 437=10 R.S. 127=171 I.C. 841=A.I.R. 1937 Sind 244.

Jurisdiction.

——*Jurisdiction—Consolidation of two decrees one of which alone under execution—Power of Court.*

There were two decrees under the jurisdiction of a Court and only as regards one had execution been taken out. Then the parties came along and by the compromise in effect these two decrees were consolidated; the parties agreed to pay instalments and also agreed that, in the event of the instalments not being paid, execution could be taken out as regards both. It was contended that the Judge had no jurisdiction to make this consolidation.

Held, that the Judge had jurisdiction over both the decrees and execution of both the decrees, and the mere fact that the compromise was stated in one petition to be with regard to two decrees in no way affected the jurisdiction of the Judge. Had the parties been so minded, they could have entered into a compromise separately in respect of each decree. But the same result was effected by the methods which the parties in fact adopted. (*Wort and Manohar Lall, JJ.*) LAKHAN SAO *v.* KANI RAM BHAGWAN DAS. 175 I.C. 655=4 B.R. 618=11 R.P. 17=19 Pat.L.T. 686=A.I.R. 1938 Pat. 270.

——*Jurisdiction—Interlocutory order in suit valued over Rs.* 5,000*—Subordinate Judge—Execution by Munsif—Competency — Objection in second appeal.*

In the course of a suit valued at more than Rs 5,000 pending in the Court of a Subordinate Judge, the latter passed an interlocutory order for costs in favour of the plaintiff. That order was sent for execution to the Court of Munsif and executed by him. Objection was raised in second appeal that the Munsif had no jurisdiction to execute the order for costs, because the suit in which it was passed was beyond his pecuniary jurisdiction.

Held, that the Munsif had no jurisdiction to execute the order in question and therefore the whole execution taken out before him was incompetent; and though no objection was taken to the jurisdiction of the Munsif either before him or in appeal, the objection could be raised in second appeal, as it was a case of inherent want of jurisdiction. (*Khaja Mohammad Noor and Varma, JJ.*) MUSAMMAT ANCHAHI *v.* BRIJMOHAN LALL MADAN LALL. 161 I.C. 700=8 R.P. 472=1936 P.W.N. 116=17 Pat.L.T. 160=A.I.R. 1936 Pat. 177.

——*Jurisdiction — Objection to—When to be taken—Court having no power to try suit—Jurisdiction to execute decree in such suit—Failure to take objection at early stage—Effect—Waiver.*

The standard by which the jurisdiction of the executing Court to execute a decree is to be considered as its capacity to try the suit itself. It cannot be urged that unless the decree on the face of it showed want of jurisdiction, the same must be deemed to exist. Nor can it be said that the question cannot be raised at a later stage, when it goes to the very foundation of the jurisdiction of the executing Court. The jurisdiction of each of the Subordinate Courts is based on what the Legislature has invested it with. It is not a matter of consent of parties. Therefore if the

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Court attempts to deal with a matter which is beyond its jurisdiction no consent of parties can give it jurisdiction. A second class subordinate Judge who has no jurisdiction to try a suit filed in the High Court can have no jurisdiction to execute the decree in that suit, although the decree is only a decree for costs for an amount which is within his jurisdiction. The fact that the objection was not taken at an early stage does not make the proceedings valid and cannot give rise to waiver. A question of waiver cannot arise unless it is pleaded; and when the question goes to the root of the jurisdiction, there is no question of waiver or acquiescence. (*Kania. J.*) RUSTOMJEE SORABJI *v.* MAHADEV CHINTAMAN. I.L.R. (1940) Bom. 633=190 I.C. 394=42 Bom.L.R. 596=A.I.R. 1940 Bom. 277.

——*Jurisdiction — Pecuniary jurisdiction of Court—Criterion.*

The criterion of the pecuniary jurisdiction of the executing Court is not the amount of the decree but the value of the suit at the time of its institution. Where the plaintiff valuing his relief for Rs. 5,000 brought a suit in the Court competent to try a suit of that value (the limit of the ordinary jurisdiction being Rs. 15,000) and the Court granted a decree for Rs. 21,000 the same Court can entertain an application for execution of the decree. (*Baguley and Mosely, JJ.*) U PO MYA *v.* FATHER RIOUFREYT. 1939 Rang.L.R. 134=181 I.C. 841=12 R.R. 498=A.I.R. 1939 Rang. 115.

——*Jurisdiction—Power to sell property beyond jurisdiction.*

A Munsif has jurisdiction to sell in execution a property beyond his own immediate jurisdiction but within the same division. (*Wort and Varma, JJ.*) HARBANS PROSAD *v.* JADUNANDAN RAI. 175 I.C. 924=11 R.P. 32=4 B.R. 655=A.I.R. 1938 Pat. 237.

——*Jurisdiction—Property sought to be proceeded against situate beyond jurisdiction of Court which passed decree—Application to Court which passed decree—If competent.*

A decree-holder has always a right to apply, of course, to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court and even if execution by such Court can be no more than execution by transmission to another Court. (*S.K. Ghose and Edgley, JJ.*) AMARENDRA NATH MULLICK *v.* BALAI CHAND GHATAK. 162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.

——*Jurisdiction—Sale in execution—Delivery effected without obstruction—Subsequent obstruction by judgment-debtor—Remedy of purchaser—Fresh delivery—Power of executing Court to order.*

Certain property of the judgment-debtor was sold in execution and an order for delivery of possession was made. The possession was effectively given by the bailiff without any obstruction. Subsequently, the purchaser was obstructed by the judgment-debtor and the Court made a fresh order for delivery of possession.

Held, Court could not issue a fresh delivery order or a series of fresh delivery orders as the case must be deemed to have been closed when effective possession was once given. The purchaser's only remedy was to file a suit. The Court

acted without jurisdiction and order could be set aside in revision. (*Roberts, C.J. and Spargo, J.*) MAUNG BA KYAW *v.* U TOK. 172 I.C. 505=10 R.R. 254=A.I.R. 1937 Rang. 449.

Limitatation.

——*Limitation—Application presented on last day of period allowed by S. 48, C. P. Code—Subsequent application to amend after period of limitation—Maintainability.*

A decree-holder who is not diligent should not, in the absence of special and sufficient, grounds be allowed to circumvent the salutary provision of S. 48, C. P. Code, fixing 12 years. Where an execution petition praying for arrest and attachment of movable property made on the last day of limitation prescribed by S. 48, C P. Code, is sought to be amended after that period, by the inclusion of a prayer for attachment of immovable property also the result of amending the petition would be to allow the decree-holder to file a fresh execution petition beyond the period of limitation prescribed. Where there are no sufficient grounds, and where the decree-holder shows no diligence, such an amendment should not properly be allowed, Special circumstances must be shown for such indulgence. (*Venkata subba Rao, J.*) BEERANKUTTY *v.* MAMMU. 164 I.C 217=1936 M W N. 1220=9 R M. 96=44 L. W. 99=A.I.R. 1936 Mad. 623=71 M.L.J. 256.

——*Limitation —Decree-holder alleging payments on particular dates—Payments admitted by judgment-debtor—Plea of limitation—Burden of proof.*

Where a plea of limitation is taken, the burden would be on the plaintiff or the applicant to show that his suit or his application is within the period prescribed by law, but where in an execution application certain payments are shown on certain dates and the judgment-debtor admits those payments but pleads limitation and does not deny the date of any specific payment, it is not necessary that the date of each payment should be proved by the decree-holder in order to show that his application is within time. (*Mehta and Lobo, A J.Cs*) HAJANSHAH *v.* RADHAKISHEN. 172 I.C. 221=10 R S. 139=A.I.R. 1937 Sind 261.

——*Limitation—Implied adjudication as to—Inference—Circumstances.*

An implied adjudication on the question of limitation can be inferred in cases where the execution Court has passed any effective order for further execution to the detriment of the judgment-debtor. But it depends on the circumstances of each case. Where notice of an execution application was sent to judgment-debtor, who did not appear and the case was consigned to records at the request of the decree-holder and the costs of the execution were given to the decree-holder and the balance due under the decree was also noted it was held that an implied adjudication on the question of limitation could not be inferred, and that the awarding of costs and noting of the balance due under the decree were mere formal matters and of a ministerial character and did not involve any adjudication on the question of limitation. (*Radhakrishna, J.*) RAMJI LAL *v.* MANDAI. 185 I.C. 650=1940 O L R 25=12 R O. 252=1940 A W R (C C.) 42=1940 O.W.N. 15=A.I.R. 1940 Oudh 226.

——*Limitation —Order rendering execution abortive—Decree-holder if relieved from keeping decree alive.*

An order which would have the effect of rendering execution proceedings abortive does not relieve the decree-holder of the burden of taking the ordinary steps to execute his decree if he wished to save that decree from the bar of limitation. (*Thom, C.J. and Ganganath, J.*) LAKSHMI CHAND *v* BIBI KALSUMANNISA. I.L.R. (1939) All. 207=180 I.C. 927=11 R A 532=1939 A.W R. (H.C.) 93=1939 A.L.J. 29=A.I.R. 1939 All. 82.

Minor.

——*Minor —Decree against —Attainment of majority in the course of execution—Duty to inform Court—On whom lies—Failure to inform Court—Effect—Inference of fraud.*

If a minor judgment-debtor happens to attain majority during the course of the execution proceedings, then it is for him to inform the Court that he had come of age and if he fails to do this the presumption is that he chose to allow the case to be conducted by his *quandom* guardian. As such a failure on the part of the decree-holder to inform the Court of such a fact cannot be construed to constitute fraud on his part. (*Thomas, C.J. and Zia-ul Hasan.*) RADHA RAWAN PRASAD *v.* RAJENDRA PRASAD 14 Luck. 213=1938 O A. 598=1938 O L.R. 371=1938 O W N. 758=177 I.C. 77=11 R O. 21=A.I.R. 1938 Oudh. 188.

Mortgage Decree.

——*Mortgage decree—Application for sale—Co-owners—Claim by, that mortgagee could proceed only against specific property allotted to mortgagor in partition—Mortgagee alleging partition to be collusive—Procedure.*

Where a mortgage decree-holder seeks to execute his decree by sale of the property mortgaged to him and certain co-owners of the property apply under O. 21, R. 58, C. P. Code, for raising the attachment, conte ding that as a result of a partition certain specific property has been allotted to the mortgagor, and that that alone could be sold in execution of the decree, and the mortgagee, on the other hand, contends that the partition is collusive, the question cannot be gone into in the execution proceedings. It is open to the mortgagee to put to auction the right, title and interest of the mortgagor, and all that the co-owners can claim is that it should be notified at the auction that there has been a partition by which a specific portion is allotted to the mortgagor and that the co-sharers contend that the rights of the purchaser, if any, will be against the portion allotted to the mortgagor and not against the whole property unless he can show that the partition, if any, was fraudulent. (*Rupchand Bilaram, A J C.*) TULSIDAS HOTCHAND *v.* KARIMANO. 166 I.C. 128 (2)=9 R.S. 122=A.I.R. 1936 Sind 208.

——*Mortgage decree—Assignment to purchaser of part of mortgaged property impleaded as defendant to suit—Effect of—Right to execute for balance of decree amount—Executing Court—If debarred from executing decree for smaller amount.*

A purchaser of part of the mortgaged properties who is impleaded as a defendant in the suit on the mortgage is perfectly entitled to pur-

chase or take an assignment of the entire mortgage decree, and when he does so, the decree is to some extent satisfied. There is no reason why he should not be permitted to execute the decree for the balance. It cannot be contended in such a case that the executing Court must take the decree as it is and that it cannot execute it for a smaller amount. (*Burn, J.*) IYYAMPERUMAL PATHAR *v.* NATARAJA PATHAR. **1937 M.W.N. 384.**

——*Mortgage decree—Decree against minors—Minor's suit for declaration that decree is not binding on them—Prayer to stay execution sale until disposal of suit—Considerations.*

A mortgage litigation had been fought out between the parties and a decree passed in favour of the mortgagee. During the suit the minor mortgagors were represented by a guardian *ad litem*. A suit was instituted by the minors for a declaration that the decree was not binding on them and they prayed that the sale in execution should be stayed until the disposal of their suit. Six years had elapsed before the minors took any steps to challenge the mortgage-decree. The Court passed an order staying the execution sale, holding that the value of the security was far in excess of the amount due under the decree.

Held, that while passing the order the Court ought also to have taken into consideration the facts that the liability of the mortgagors in respect of the mortgage had been established in a competent Court in the presence of the parties concerned and that six years had elapsed before they took any steps to challenge the mortgage. The successful mortgagee should be allowed to execute his decree and the order of the lower Court staying the sale was set aside. (*Agarwala and Varma, JJ*). DAMODAR DAS *v.* BINDESHWARI SINGH. **160 I.C. 923=8 R.P 392=1936 P.W.N. 149=A.I.R. 1936 Pat. 76.**

——Mortgage decree—Mortgage of land and future crops—Decree for sale declaring charge on future crops—Lessee subsequent to final decree—Crops raised by—Liability to be sold in execution. *See* T. P. ACT, S. 52. **71 M L J 638**

——Mortgage decree—Mortgagee purchaser—Rights of. *See* MORTGAGE—MORTGAGE SUIT. **A.I.R 1936 Rang 127.**

—— Mortgage decree—Property not included in suit and decree—Fraudulent insertion in sale proclamation and sale certificate—Effect—Title of purchaser. *See* C. P CODE, O. 34, R. 5. **A.I.R. 1936 Rang. 127.**

——*Mortgage decree—Purchaser of mortgaged premises—Premises mortgaged in entirety—Mortgagor, a member of joint family—Admission by him in previous mortgage that his share in premises is only one-third—Other members threatening to file suit—Purchaser, if can be compelled to complete purchase.*

The applicant was the purchaser of certain mortgaged premises sold in pursuance of a final decree for sale. The mortgage was of the premises in entirety, and the mortgagor was a senior member of a joint Hindu family. In a previous mortgage of the same premises along with other property, the mortgagor had described the security as his one-third undivided share. One of the other members threatened to e force his alleged rights in the mortgaged premises by instituting a suit.

Held, that the applicant, if compelled to take the property, had every reason to apprehend harassing litigation from the other members of the mortgagor's joint family and that in the circumstances of the case, it would be inequitable to force him to complete the purchase. (*Panckridge, J.*) BENARES BANK, LTD. *v.* BALORAM DEY. **41 C.W N. 520.**

——Mortgage decree—Right of decree-holder Exe-ution against some of morfgaged properties. *See* C. P. CODE, O. 34, R. 5 (3). **I.L.R. (1939) 2 Cal. 455.**

——*Mortgage decree — Sale — Purchaser of equity of redemption—Rights of as against mortgagee purchaser in execution of decree on mortgage—Non-joinder in mortgage suit—Effect.*

A purchaser of the equity of redemption in mortgaged property has the rights which the mortgagor had in that property, substantive not adjective rights, *viz*., to have the option of retaining the property on paying the mortgage debt. That is what he buys and pays for; and such right cannot be affected by a suit to which he is not a party, so that if a suit is instituted on the mortgage by the mortgagee and at a sale in execution of the mortgage decree, the property is purchased by the mortgagee, such purchase cannot adversely affect the rights of the prior purchaser who has not been made a party to the suit on the mortgage. But apart fr m that the purchaser of the equity of redemption is in no better position than a trespasser. (*Ramesam and Stone, JJ*.) SAMBASIVA AYYAR *v.* SUBRAMANIA PILLAI. **59 Mad. 312=170 I C. 856=10 R.M. 235=44 L W. 887=A I.R. 1936 Mad 70**

——*Mortgage decree — Sale in execution—Right of purchaser—Interest not included in execution—Subsequent execution against property sold—If available as against auction-purchaser's property.*

An auction-purchaser purchased a mortgaged field from the judgment-debtor, with permission of the Collector, for the amount mentioned in the *C* form. Two months after the purchase, the decree-holder applied to the Court saying that full amount of interest from the last execution application to the date of realisation was not recovered. A fresh *C* form was then prepared and proceedings were started again with respect to the property purchased by auction-purchaser.

Held, that the auction-purchaser having purchased the property for a definite amount, the transaction became final so far as he was concerned and he was not to blame for the mistake which had occurred Probably it was the decree-holder who was to be blamed for not including the full amount due in his first execution application. The property purchased by the auction-purchaser was not therefore liable to be proceeded against for the interest due and could not be sold. (*Gruer, J.*) TRIMBAK LAXMAN *v.* BALIRAM PANDUSA. **I L.R. (1937) Nag. 156=168 I. C. 221=9 R.N. 244=A.I R. 1937 Nag. 59.**

——*Mortgage decree against two properties—Decree holder agreeing to execute against one item in the first instance—Effect—Sale of that item becoming impossible—Right to proceed against other item.*

Where there is a mortgage decree as against two items of property and the decree-holder agrees to execute the decree as against one of the

items only in the first instance and to proceed against the other, in case of deficiency, the effect is that both properties always remain liable for the debt. The mere fact that the decree-holder agreed to proceed against one of the properties first could not prevent him from proceeding against the second property, if for any reason the sale of the first property was prohibited or became impossible. (*Davis.*) IMAM ALI *v.* SOBHAG MAL. **1940 A.M.L.J. 7.**

Objection by debtor.

——Objection by debtor—Mortgage by tenant of holding—Decree on—Sale of holding in execution—Plea by tenant that holding is non-transferable—If open—Estoppel. *See* EVIDENCE ACT, S. 115. **19 P.L.T. 421.**

Procedure.

——Procedure—Court passing decree legally directed to stay execution—If can recall certificate for execution issued to another Court. *See* UNITED PROVINCES ENCUMBERED ESTATES ACT, S. 7. **1938 A.W.R. (H.C.) 853=1939 A.L.J. 13 (F.B.).**

——*Procedure — Decree against ghatwal—Attachment of surplus income of ghatwal—Execution—Mode of—Proper procedure—Appointment of receiver.*

Where the surplus profits of a ghatwali estate are attached in execution of a decree against the ghatwal, the proper procedure is to appoint a receiver for realising the rents and profits of the property, paying out of the sum a sufficient and adequate amount for the maintenance of the judgment-debtor and his family and applying the balance to the liquidation of the creditor's debts. (*Rowland and Chatterji, JJ.*) BANSIDHAR SHROFF *v.* ASHUTOSH. **180 I.C. 8=11 R.P. 436=5 B.R. 344=1939 P.W.N. 86=A.I.R. 1939 Pat. 242.**

Rateable distribution.

——Rateable distribution—Powers of executing Court—Holders of decree attaching but not applying for execution before receipt of assets—Court's powers to distribute assets. *See* C. P. CODE, S. 73. **A.I.R. 1936 Cal. 300.**

Rent decree.

——Rent decree—Mode available to landlord—Decree-holder—If restricted to rent-paying property. *See* B. T. ACT—APPLICABILITY. **A.I.R. 1936 Pat. 258.**

Res Judicata.

——*Res judicata*—Order dismissing application as not pressed—Effect of—If *res judicata. See* C. P. CODE, S. 11. **71 M.L.J. 490.**

Revision.

——Revision—Order dismissing execution for non prosecution—No Appeal—Revision. *See* C. P. CODE, S. 2 (2). **A.I.R. 1936 Cal. 267.**

Revival.

——*Revival—Application for execution—Dismissal—High Court setting aside dismissal—Effect of—Proceedings if revived.*

An execution petition was dismissed by the Court, but on appeal the High Court set aside the order of dismissal and directed that the execution should proceed except against some of the judgment-debtors or their heirs. The execution proceedings were then continued in accordance with the order of the High Court.

Held, that the effect of the order of the High Court was to revive the execution proceedings by vacating the order of dismissal and hence a fresh execution petition was not necessary. (*Fazl Ali and Luby, JJ.*) RAM PRASAD SINGH *v.* BENI MADHO SINGH. **160 I.C. 678=8 R.P. 380=A.I.R. 1936 Pat. 26.**

——*Revival — Application under Encumbered Estates Act subsequent to execution application—Stay—Dismissal of application under Encumbered Estates Act—Fresh application for execution—If barred by limitation.*

Where on a judgment-debtor's application under Encumbered Estates Act action on the decree-holder's application for execution was delayed, and after the rejection of the application under the Encumbered Estates Act a fresh application for execution was put in by the decree-holder on a plea that it was barred by limitation, it was held that the execution proceedings after being intercepted by various side issues were re-established and that the last execution application was entered in continuatlon of the original application which was within time and hence not barred by limitation. (*Harper, J. M.*) RAMADHIN *v.* SARASWATI PRASAD. **1940 R.D. 196 (2)=1940 A.W.R. (B.R.) 73 (2).**

——*Revival — Conditions — Decree against father and sons—Execution sale—Purchase by decree-holder—Subsequent exoneration of sons' shares in separate suit—Revival of execution against father—Permissibility.*

Where the holder of a decree against a father and sons executes it by sale of their properties and purchases them himself and the decree is thereby satisfied, the fact that the sons subsequently sue for a declaration of invalidity of the decree and obtain a decree exempting their shares from the operation of that decree, does not give the decree-holder any right to revive the execution proceedings against the father for the amount proportionately reduced on account of such exemption. It is immaterial that in his capacity as auction-purchaser he has purchased the property of some one who was not liable under the decree. (*Courtney Terrell, C.J. and Varma, J.*) PHULCHAND RAM MARWARI *v.* NAURANGI LALL MARWARI. **164 I.C. 1073=9 R.P. 144=16 Pat.L.T. 906=2 B.R. 795 (1).**

——*Revival—Conditions—Prior execution application dismissed for administrative purposes—Subsequent application—If one to continue prior application.*

A subsequent execution application, though not stated to be in renewal of a prior application, is in fact a renewal of the prior application, provided that the nature of the proceedings is the same as in the prior application that has been dismissed for administrative or statiscal purposes or such as to necessitate a revival of the earlier one. If the reliefs asked for in the two have no necessary connection, the later would not be a revival of the earlier. It is not necessary to ask expressly in the later one for the old one to be revived. If it is referred to in the later one, and the prayer in the later application is such that it makes it clear that it continues the old execution petition, it has the effect of reviving it. (*Mockett and Horwill, JJ.*) ANNAMALAI CHETTIAR *v.* V. T. CHETTIAR FIRM. **173 I.C. 579=10 R.M. 613=**

1937 M.W.N. 348=46 L.W. 350=A.I.R. 1937 Mad. 721.

———*Revival—Conditions of—Sale in execution of money-decree—Purchase by decree-holder—Judgment-debtor having no saleable interest—Sale if null and void—Application for revival of execution—Maintainability.*

A sale of immovable property in which the judgment-debtor has no saleable interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing Court or void as between the judgment-debtor and the decree-holder, or auction purchaser; the decree-holder, if he purchases the property cannot successfully maintain an application for the revival of execution proceedings on the ground that the sale has not in fact satisfied his decree, to the extent of the sale-price, unless he has the sale set aside by applying under O, 21, R. 91, C. P. Code. (*Courtney-Terrell, C. J., Dhavle and Agarwala JJ.*) SURANDRA KUMAR SINGH *v.* SRICHAND MAHATA. 15 Pat. 308=160 I C. 1049 =8 R.P. 405=1936 P W.N. 36=16 Pat.L.T. 908 =A I.R. 1936 Pat. 97 (F.B.).

———Revival—'Consigned to record room'—If a 'dismissal'. *See* C. P CODE, O. 21, R. 57. 39 P. L.R. 967.

———*Revival—Continuation—Second attachment —Type of property to be same.*

A subsequent application for attachment would be a continuation of a prior one, only when the type of the property to be attached is not different. (*Marsh, S.M. and Mehta, J.M.*) BHAGWAN DAS *v.* SHAMBU NARAIN SINGH. 1939 R D. 223 =1939 A.W.R. (B R,) 67 (1)=1939 A.L.J. (Supp.) 58.

———*Revival—Dismissal of prior application on ground which subsequently turns out baseless—No default on part of applicant—Subsequent application—If revival or fresh application.*

Where a former application was dismissed finally but for some reason (not due to any neglect or default on the part of the applicant) which has subsequently turned out to be untenable, a later application by the applicant must be deemed to be one for revival of the former one and not a fresh application. (*Venkataramana Rao, J.*) PALANIAPPA CHETTIAR *v.* RAMASWAMI SERVAI. 1937 M.W.N 258=45 L.W. 568=169 I C. 673=10 R.M. 100=A.I.R. 1937 Mad. 582= (1937) 1 M.L.J 667.

———*Revival—Execution case dismissed on part satisfaction—One of attached properties not sold by mistake of Court officer—Right of decree-holder to revive execution case.*

Where in execution of a money decree 8 lots of immovable properties were attached but by mistake on the part of Nazir only 7 out of 8 lots were actually sold and the execution case was dismissed on part satisfaction, on a subsequent application by the decree-holder for reviving the execution case in order to sell the property of lot No, 8.

Held, that having regard to the fact that the 8th property had been attached and there was no order made directing removal of attachment, there was no legal bar to the decree-holder being allowed to revive that execution case.

Held further, that the mistake being on the part of the Court's officer, it was for the Court to remedy that mistake by treating the subsequent application as a continuation of the previous execution case. (*S. K. Ghose, J.*) DURGA DAS CHAKRABURTTY *v.* KULA CHANDRA CHAKRABURTTY 42 C.W.N. 286.

———Revival— Meaning of—Execution case struck off at request of decree-holder—If pending —Subsequent application—If revival *See* LIMITATION ACT, ARTS 181 AND 182. 1937 A.W.R. 394.

———*Revival—Order dismissing execution case —Order is final—Subsequent application for execution—If fresh application or continuation of prior one.*

When the order of executing Court was to the effect that the execution case be dismissed on part satisfaction with costs and the Court was not moved to review that order, nor was any appeal presented to any superior Court to revise or vacate it, the order is an order finally disposing of execution case and a subsequent application for execution must be considered to be a new application. (*Varma and Rowland, JJ.*) INDERJIT NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAH DEO. 18 Pat. 378=182 I C. 821=5 B.R. 830=12 R.P. 74=1939 P W.N 641=20 P. L.T. 726=A.I.R. 1939 Pat. 230.

———*Revival—Striking off execution application —Subsequent application—If fresh application or revival of former.*

An application in execution which is necessitated by the action of the Court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) SIVASUBRAMANIAN CHETTIAR *v.* MURUGESA MUDALIAR. 1940 M.W.N. 345=51 L. W. 739=A.I.R. 1940 Mad. 566=(1940) 1 M.L. J. 537.

———*Revival—Successful objection to execution —Suit by decree-holder—Subsequent application more than three years of prior application—If barred—Revival of prior application.*

An application for execution of a decree made more than three years after the last application for execution would not be barred if the last application was interrupted by a successful objector against whom the decree-holder had to bring a civil suit. The application so made would not be a fresh application, but a revival of the previous application, *i.e.*, one to continue the previous application. (*Darling, S.M. and Bomford, J.M.*) RANGAI BHAR *v.* SONBARSA. 1937 R.D. 289=1937 A.W.R 623.

———Revival—Test. *See* C. P. CODE, SS. 47 AND 48. 1940 A.L.J. 301 (F.B.).

Right of execution.

———Right of—Decree in favour of receiver—Receiver discharged partially. *See* RECEIVER—DISCHARGE OF. I.L R. (1937) 2 Cal. 529.

———*Rights of decree holder—Land held by judgment-debtor as lessee subject to conditions—Decree-holder, if can ignore the conditions.*

Where the judgment-debtor is only a lessee of the land sought to be attached and sold, and the lease is held by him subject to certain conditions, under which his right to sell the property is restricted, the decree-holder is also bound by those conditions and it is not open to him to ignore the restrictions on the judgment debtor's rights of transfer and to assume that he has an unrestric-

ted alienable interest in the property attached (*Jai Lal, J.*) P. WYILE *v.* BOARD OF FOREIGN MISSION OF PRESBYTERIAN CHURCH. 171 I.C 546=10 R.L. 213=39 P.L.R. 305=A I.R. 1937 Lah. 93.

———Right to—Compromise decree—Creation of charge for maintenance and imposition of personal liability on defendant—Execution sale—Purchase by decree-holder subject to charge for maintenance—Subsequent execution against defendant personally—Competency. *See* T. P. ACT, Ss. 100 AND 101. 71 M.L.J. 538

———*Right to—Compromise decree against* X *and* Y—X *to be proceeded against in first instance—Execution against* X *unsuccessful—Decree-holder's right to proceed against* Y.

According to a compromise decree passed against *X* and *Y*, the decretal amount was to be paid by *X* in monthly instalments. In case of default by him in payment of six instalments, the decree-holder was entitled to take out execution against him. If within two years from the date of the first execution the decretal amount was not realised from *X* in any way (*i e.*) through attachment of property, movable and immovable, and by the issue of the warrant of arrest, the decree-holder was entitled to realise from *Y* that part of the decretal amount which remained due. *X* made default in payment of six instalments, and the decree-holder took out execution against him by way of arrest. *X* applied for time for payment and the decree-holder agreed to give him three months. After the expiry of this period execution by way of arrest was renewed but it was found that *X* had left India. *X* had no assets worth attaching within the jurisdiction of the Court. He was subsequently declared insolvent on his own application.

Held, that the decree-holder showed due diligence within the meaning of the decree in proceeding against *X*, and that having done so without effect, he was entitled to proceed against *Y* in execution. (*Lord Macmillan*) MAULA BUX *v.* ABDUL LATIF. I L R. (1939) Kar. (P.C.) 369=50 L.W. 448=1939 O.L.R. 528=183 I.C 321=43 C.W.N. 1204=5 B.R 976=12 R P.C. 68=20 P. L.T. 783=A.I.R. 1939 P.C. 242 (P.C.).

———Right to—Decree adjusted and certified—Certification not recorded by Court—Decree-holder's right to execute decree. *See* C. P. CODE, O. 21, R. 2. A I R. 1937 Rang. 507.

———*Right to—Joint decree for costs—Release by decree-holder of one defendant from liability—Right to execute against others—Apportionment of costs—Principle.*

In a suit for possession of property different sets of defendants were entitled to different interest in the property. A decree against them was made in respect of the properties and one joint order for costs payable by the defendants jointly was made. Under a compromise with defendant *A* the plaintiff released him from his liability for the costs, but there was no intention of the parties to treat the entire order for costs as satisfied.

Held, that in such circumstances the decree-holder was entitled to proceed against other defendants than *A* for realization of a proportionate share of the costs.

Held further, that in calculating the proportion of costs the proportion of the respective shares of the defendants in the property should be taken into account. (*Mukerji and S. K. Ghose, JJ.*) KHOKA DAS *v.* MAHENDRA NATH BISWAS 165 I. C. 462=9 R.C. 402=41 C.W.N. 174=A.I.R. 1936 Cal. 656.

———*Right to—Joint decree holders—Death of one—Surviving decree-holder—Right of to continue execution.*

In a case where the application for execution is by two persons and one of them dies, the execution proceedings cannot be said to have terminated automatically. The surviving decree-holder can continue the same for the benefit of himself and legal representatives of his co-decree-holder and all that he is required to do is to state to the Court the fact of death of his co-decree-holder and the names of the legal representatives. (*R. C. Mitter, J.*) KSHIRODE CHANDRA PAL *v.* BRAHMANATH PAL. 166 I.C 374=9 R.C. 508=64 C.L.J. 47=A.I.R. 1936 Cal. 571.

Sale.

———*Sale—Absence of attachment--If renders sale null and void.*

A sale in execution is not a nullity even if it is not preceded by an attachment. Neither R. 30 nor R. 64 of O. 21, C.P. Code, negatives the power expressly given to the Court by S. 51 of the Code, to sell without attachment. (*Beaumont. C.J. and Lokur, J*) NAMDEV KRISHNA *v.* GOVARDHAN. I.L. R. (1939) Bom. 420=183 I C. 457=12 R.B. 101 =41 Bom.L.R. 463=A.I R. 1939 Bom. 277.

———*Sale—Absence of proclamation—Inadequacy of price—Inference as regards the cause of.*

The fact that there was no proclamation might legitimately give rise to an inference that if the sale had been proclaimed, the intending purchasers might have been present to bid for the property which might have fetched a higher price in consequence. (*Abdur Rahman, J.*) ANNAMALAI CHETTIAR *v.* CHELLAMMAI ACHI. 175 I C. 493=10 R.M. 786=47 L.W 434=1937 M.W.N 1201 =A.I.R. 1938 Mad. 174=(1937) 2 M.L.J. 936

———Sale—Absence of subsisting attachment—If vitiates sale *See* C. P. CODE, O. 21, R. 90. 38 Bom.L.R. 719=A.I.R. 1936 Bom. 315.

———*Sale—Binding nature—Suit to recover possession of part of property sold—Maintainability.*

When an execution sale has been confirmed by the Court and has become absolute under the terms of O. 21, C P. Code, it must be considered valid until it is set aside. Where a suit is brought for recovery of possession of part of the properties sold in execution of a mortgage decree on the allegation that an area in excess of that covered by the mortgage decree had been sold it is in substance a suit to avoid an auction sale held in execution of a decree and is hence not maintainable. (*Thom. C.J.*) BARU *v.* AMIR SINGH. 187 I.C. 294=12 R A 511=1939 A.L J. 1015=1939 A.W.R. (H.C.) 867=A.I.R. 1940 All. 78.

———Sale—Death of judgment-debtor before sale but after order for sale—Sale without joinder of legal representatives—If null ty. *See* C. P. CODE, S. 50 AND O. 21, R. 22. 43 L.W. 238=1936 M W.N 60=A.I R. 1936 Mad. 205=70 M.L J. 162 (F.B)

———*Sale in—Decree-holder and auction-purchaser—Respective rights of* inter se—*Judgment-debtor having no saleable interest—Suit by purchaser against decree-holder—Maintainability—Cause of action.*

Fazl Ali, J.—Before a party can be said to have a right of action it must be shown that he has a cause of action. A decree-holder can by no stretch of reasoning be said to be the vendor of the auction-purchaser; there is no privity of contract between them, and their respective rights cannot be dealt with as if they were parties to a private sale. It cannot be said that the decree-holder offers an unqualified guarantee as to the good title of the judgment-debtor. The auction-purchaser cannot therefore have any right of action against the decree-holder, if it transpires that the judgment-debtor has no saleable interest in the property sold. (*Fazl Ali and Rowland, JJ.*) PALI RAM *v.* LAHERIA SARAI CENTRAL CO-OPERATIVE BANK, LTD. **19 Pat.L.T. 80=175 I.C. 347=4 B.R. 577=10 R.P. 615=A.I.R. 1938 Pat. 150.**

——*Sale—Encumbrance — Mortgage of, or charge on, property to be sold—Ways of notifying them—Effect of notification in case of mortgage and charge.*

A mortgage or charge can be brought to the notice of intending purchasers at Court sale in two ways: firstly if a claim preferred under O. 21, R. 59 by the mortgagee succeeds, the fact of the mortgage must be inserted in the sale proclamation. In that case the order passed under O. 21. R.62, if not set aside by a suit instituted under the provisions of O. 21, R. 63 would stand as a final order and would preclude the purchasers at the Court-sale from challenging the mortgage. A mortgage, or charge, however, can also be notified in the sale proclamation settled under the provisions of O. 21, R. 66 or otherwise at the time of the sale. Where a mortgage or charge is notified at the sale, but not as a result of an order made by the Court under O. 21, R. 62, the notification has no greater or less effect in law than that of notice. The purchaser at the Court-sale in that case only takes with notice of the mortgage or charge. In the case of a mortgage such notification does not carry the matter further, for a mortgage is binding on the purchaser of the equity of redemption whether he has notice of it or not. But in the case of a charge its notification has a value. 28 All. 418 and A.I.R. 1920 Cal. 354, Rel. on. (*R. C. Mitter, J.*) EMDAD ALI *v.* HARAN SHEIKH. **168 I.C. 959=9 R.C. 884=A.I.R. 1936 Cal. 590.**

——*Sale—Irregularities—Waiver of — Judgment-debtor applying for time and stating that he would not object to sale under fresh proclamation —Effect of.*

In a petition to a Court the judgment-debtors stated that they would not have any right to object to the right of the decree-holder to sell properties to be mentioned in the fresh sale proclamations and to try to get the sale set aside on any grounds mentioned in O. 21, R. 90, C. P. Code, or on any other ground whatsoever.

Held, that the judgment-debtors waived their right to raise objections. (*Wort and Varma, JJ.*) BATAKRISHNA PRASAD *v.* APURBO KRISHNA. **175 I.C. 194=4 B.R. 547=10 R.P. 593=A.I.R. 1938 Pat. 199.**

——*Sale—Purchaser—Rights of.*

In execution of a mortgage decree against a Mahomedan mother and her minor son who was represented by his brother as guardian *ad litem* in the suit the property was sold and purchased by a third person. Subsequently, in the suit by the minor challenging mortgage on the ground that his mother could not execute a valid mortgage on his behalf and that his brother who was guardian *ad litem* in the mortgage suit did not raise any such plea.

Held, that the rights of the *bona fide* auction purchaser were not affected and the sale could not be set aside, (*Din Mahomed, J.*) AHMAD KHAN *v.* MIRAJ DIN. **A.I.R. 1940 Lah. 80.**

——*Sale—Purchaser's rights —Decree-holder auction-purchaser losing property under decree obtained by third party—Right to sue for sale proceeds paid to another decree-holder as rateable distribution.*

Where a decree-holder brings a certain property to sale under a mistake of fact as to its ownership and purchases it himself and subsequently loses the same under a decree passed in a suit brought by a third party against him and the judgment-debtor, in which the property was held not to belong to the judgment-debtor, the decree-holder auction-purchaser is entitled to bring a suit against another decree-holder for the recovery of the money paid to him out of the sale proceeds as rateable distribution. (*Zia-ul-Hasan, J.*) SARDAR KHAN *v.* BADRI PRASAD. **12 Luck. 626=165 I.C. 706=9 R.O. 237=1936 O.W.N. 1137=1936 O.L.R. 672=A.I.R. 1937 Oudh 14.**

——*Sale—Purchaser's rights—Judgment-debtor having no interest in property sold—Right of purchaser to refund of consideration from decree-holder.*

In India an action for recovery of money paid for a consideration which has failed is maintainable as in England inasmuch as S. 65, Contract Act and Ss. 38 and 41, Specific Relief Act seem to recognise the principle that money paid for a consideration which has failed can be recovered. The principle underlying such action can be invoked in cases of involuntary sales. Though there is no guarantee in a Court-sale, there is some duty which is imposed by law upon the decree-holder in this connexion, as under the C. P. Code, when an application for attachment is made by the decree-holder the application must contain a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same. The existence of the judgment-debtor's interest in the property to be attached is thus affirmed by the decree-holder. If the decree-holder states something which is false, and makes that statement knowing it to be false, with a view to mislead the bidders there is obviously a case of fraud, and the auction-purchaser on being deprived of the property purchased by him, would have a perfectly good cause of action for money had and received as on a total failure of consideration. But even when the misrepresentation is innocent, or there is mistake or ignorance of facts, under which the parties are labouring, which lead to the invalidity of the whole proceeding, a fiction of a promise to pay can be justly imputed to the decree-holder, and it would be against natural justice to allow him to retain the money which he got possession of under such ignorance or mistake. The auction-purchaser can even then invoke the principle in his favour and claim refund of the money paid under an honest mistake of facts. (*Nasim Ali and B. K. Mukerjea, JJ.*) CHAITANYA DAS BANERJEE *v.* RANJIT PAL CHOWDHURY. **I.L.R.**

EXECUTION.

(1938) 1 Cal. 512=182 I.C. 244=12 R.C. 24=67 C.L.J. 16=A.I.R. 1938 Cal. 263.

——Sale—Purchaser's rights—If affected by charge decree of which he has no notice. *See* T. P. Act, S. 100. **64 C.L.J. 280.**

——*Sale—Purchaser's rights—Property purchased with notice of mortgage or charge—Purchaser, if precluded from challenging it.*

A mortgage or charge can be brought to the notice of intending purchasers at Court-sales in two ways. Firstly if a claim preferred under O. 21, R. 59, C. P. Code, by the mortgagee succeeds the fact of the mortgage must be inserted in the sale proclamation. In that case the order passed under O. 21, R. 62, if not set aside by a suit instituted under the provisions of O. 21, R. 63, would stand as a final order and would preclude the purchaser at the Court-sale from challenging the mortgage. A mortgage or charge, however, can also be notified in the sale proclamation settled under the provisions of O. 21, R. 66, or at the time of the sale. Where a mortgage or charge is notified at the sale but not as a result of an order made by the Court under O. 21, R. 62, the notification has no greater or less effect in law than that of notice. The purchaser at the Court sale in that case only takes with notice of the mortgage or charge and is not precluded from challenging it, if he is not otherwise precluded on other grounds. (*R. C Mitter, J.*) Emdad Ali *v.* Haran Sheikh. **9 R.C. 884=168 I.C. 959=A.I.R. 1936 Cal. 590.**

——*Sale—Purchaser's rights—Purchaser losing part of property under decree obtained by third party—Right to sue decree-holder for refund of purchase money.*

An auction-purchaser can maintain a regular suit against the decree-holder for recovery of his purchase-money, even though under a decree passed in a suit brought by a third party he loses only a portion of the property purchased by him and not the entire property. (*Srivastava, Ag. C.J. and Nanavutty, JJ.*) Gobind Prasad *v.* Hasan Shah. **13 Luck. 138=166 I C 705=9 R.O 331 =1937 O.L.R. 40 (2)=1937 O.W.N. 83=A I.R. 1937 Oudh 286.**

——*Sale—Purchaser's rights—Purchaser under money and mortgage decrees.*

While a purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. (*Sir George Rankin.*) Jadunath Roy *v.* Parameshwar Mullick. **67 I.A. 11=I.L.R. (1940) Kar. (P.C.) 33=I.L.R. (1940) 1 Cal. 255=44 C W.N. 233=12 R.P.C. 98=1940 O W N. 96=1940 O.L R. 26=70 C L. J. 546=1940 O.A. 145=6 B.R. 251=42 Bom.L. R. 331=21 P.L.T. 237=1940 P.W.N 328=1940 A.W.R. (P.C.) 15=185 I C. 234=A.I.R. 1940 P.C. 11=(1940) 1 M.L.J. 97 (P C.).**

——*Sale—Purchaser's rights—Sale of right, title and interest of judgment-debtor in movable property—Such property subsequently recovered by true owner from purchaser—Purchaser's right to recover back purchase price from decree holder —C. P. Code, O. 21, R. 93.*

Per *Full Bench.*—If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) movable property, and such property is subsequently recovered by its true owner from the auction-purchaser, the auction-purchaser is entitled to recover from the decree-holder the money which he has paid on the ground that there has been a total failure of consideration.

Per *Roberts, C. J.*—O. 21, R. 93, C. P. Code, only comes into operation if an order setting aside a sale has been passed under R. 92 and it does not provide the exclusive remedy of the auction-purchaser, and these rules have no application where an auction-purchaser has been deprived of the property purchased by him after the sale has been confirmed and by reason of the intervention of the true owner upon the ground that the judgment-debtor had no saleable interest in the property.

Per *Baguley, J.*—It is conceded that if the judgment-debtor has some interest in the property sold there is no guarantee by any party or by the Court as to the extent of that interest, and, if that interest is sold, the sale becomes absolute and no more can be said or done about it in the absence of misrepresentation, fraud, etc. On the other hand when the judgment-debtor has no attachable interest at all, nothing has been sold, and if nothing is sold there is no sale. There is therefore nothing to become absolute and nothing to be set aside. There is simply a payment of money in return for nothing.

Per *Sharpe, J.*—The whole basis of a sale of movable property, be it a sale by the Court or not is that something is sold. That basis is unchanged even in cases where the sale is by the Court in execution of a decree, the sale proclamation saying that only the right, title and interest of the judgment-debtor is being sold. In those cases in which it transpires that nothing whatever is in fact sold there is, if the purchaser has paid the purchase-money, a total failure of consideration, and the purchaser is entitled to recover back purchase-money as money had and received to his use. (*Roberts, C. J., Baguley and Sharpe, JJ.*) Maung Aye Maung *v.* A. Scott & Co. **1939 Rang. L.R 649=185 I.C. 757=12 R.R. 225=A. I.R. 1940 Rang. 1 (F.B.).**

——*Sale—Purchaser's title—Some portion of property released from attachment—Auction-purchaser purchasing whole property at auction.*

There is no guarantee that the auction-purchaser's title is perfect and unassailable. He merely obtains the right, title and interest of the judgment-debtor. So, where by a formal order of the Court certain portion of the property is released, from execution, the judgment-debtor ceases to be the judgment-debtor in respect of the portion ordered to be exempt from execution and therefore the auction-purchaser cannot resist the claim of the judgment-debtor in respect of the portion which could not be sold in execution of decree but which he purchases at auction. His position, in respect of that portion, is merely that

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of a trespasser. 13 Bom. 34, Rel. on. (*Agha Haidar, J.*) JALAL DIN *v.* SANT RAM. **169 I C. 870=10 R.L. 51=39 P.L.R. 210=A.I.R. 1937 Lah. 29.**

——*Sale—Rent decree—Sale in execution of—What passes—Purchaser—If gets whole tenure or holding or only interest of judgment-debtor.*

The question whether a sale held in execution of a rent decree passes only the judgment-debtor's interest in the property sold or the whole holding or tenure depends upon the form of the execution proceedings including the sale proclamation and the sale certificate, as well as the proceedings in the suit in which the decree was made. (*Harries, C. J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. **19 Pat 618=188 I.C. 729=13 R.P. 20=1940 P.W.N. 420 =6 B.R. 713=21 Pat.L.T. 377=A.I.R. 1940 Pat. 328 (F.B).**

——*Sale—Rights of auction-purchaser.*

An auction-purchaser of property cannot acquire anything more than the rights, title and interests of the judgment-debtor. (*Agha Haidar, J.*) BABU RAM *v.* BASHESHAR DASS. **38 P.L.R. 539.**

——*Sale—Rights of auction purchaser—Decree obtained by third person against property sold, after confirmation of sale—Auction-purchaser, if can claim refund of money paid.*

At an auction-sale, it is only the right and title of the judgment-debtor which passes to the auction-purchaser, and the auction-purchaser takes that right and title subject to any claims which may subsequently be made by third parties. Accordingly an auction-purchaser cannot claim a refund of the money paid from the decree-holder if after the confirmation of the sale in his favour certain persons bring a suit for possession claiming a share in the property sold at the auction sale and obtain a decree for possession. (*Bennet, J.*) IDIA *v.* LACHMI NARAIN. **166 I.C. 611=9 R. A. 426 (2)=1937 All.L.R. 57=1936 A W.R. 982 =1936 A L.J. 1196=A.I.R. 1937 All. 18.**

——*Sale—Sale in pursuance of order in partition suit—Sale subject to confirmation of Court—Person making highest bid in excess of reserve price—Right to have sale confirmed—Offer of higher price by another after sale—If ground for refusing to confirm.*

The fact that a sale is subject to the confirmation of the Court does not mean that the Court shall refuse to accept the highest bid because at a later stage some one on second thought says that he is willing to pay more. The condition that the sale is to be subject to the confirmation of the Court is a safeguard against irregularity or fraud in connection with the sale and against property being sold at an inadequate price. A purchaser who makes the highest bid which is in excess of the reserve price agreed upon and complies with all the requirements of the Court is entitled to have the sale confirmed, when there is no irregularity. The mere fact that between the sale and the confirmation a higher price is offered by another party is no ground for refusing to confirm the sale. (*Leach, C.J. and Kunhi Raman, J.*) SOUNDARARAJAN *v.* KHAKA MAHOMED ISMAIL SAHEB. **186 I.C. 118=12 R.M. 591=50 L.W. 699=1939 M.W.N. 1115 (1)=A.I.R. 1940 Mad. 42.**

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——*Sale—Sale proclamation—Material misdescription in—Right of purchaser to sue decree-holder for damages.*

Where the sale proclamation for which the decree-holder was mainly responsible as regards the particulars, stated the extent of the land to be 1 acre and 25 cents, whereas after the confirmation of the sale, the area was found to be only 78 cents, the purchaser, who has been misled by this material misdescription of the property, has a right of action against the decree-holder for the loss he has suffered, thereby, even though there is no suggestion that the decree-holder practised a fraud in so describing the area of the property (*Cornish, J.*) RAMAYYA *v.* KOMARAPPA **160 I.C. 209=8 R.M 614=1935 M.W.N. 1207=43 L.W 262=A.I.R. 1936 Mad. 421.**

——Sale—Sale proclamation—Sale in execution of decree on prior mortgage—Subsequent mortgagee impleaded in suit but given up—Objection by to sale—Subsequent encumbrance—Necessity for mentioning in proclamation *See* C. P. CODE, S. 47. **A.I.R 1936 Pat. 552.**

——*Sale—Sale proclamation—Under-valuation of property—Objection by judgment debtor after sale—Maintainability.*

If a judgment-debtor has notice of the date for settling the sale proclamation and has an opportunity of urging that the property has been under-valued in the draft sale proclamation, he cannot afterwards be heard to say after the sale that the proclamation is defective due to under-valuation of the property. But if no date be fixed for the judgment-debtor to raise objections to the draft sale proclamation, and the proclamation is settled without his being consulted in any way about it, he cannot be shut out from objecting after the sale that the property was grossly under-valued in the sale proclamation. (*Reilly, C.J. and Shankaranarayana Rao, J.*) VIJAYARANGAM MUDALIYAR *v.* CHINNASAMI CHETTY. **14 Mys.L.J 77.**

——*Sale—Purchaser's rights—Same property mortgaged and subsequently sold in execution of money decree—Auction-purchaser, if can dispute either payment or adequacy of consideration for mortgage.*

When the same property is mortgaged and subsequently sold in execution of a money decree against the owner of the property, the auction-purchaser of such property cannot dispute the payment of consideration for the mortgage or its adequacy or inadequacy, unless it is established by clear and cogent evidence that the mortgage was never intended or designed to operate as a real transaction or to affect a transfer of title. (*Nasim Ali and Bartley, JJ.*) JAGADAMBA PROSAD *v.* BADRI PRASAD. **171 I.C. 522=10 R.C. 276=A. I.R. 1937 Cal. 203.**

——*Sale—Setting aside—Fraud—False representation having effect of dissuading bidders from bidding.*

In a revenue sale where there was not merely dissuading of bidders but there was a representation which amounted to a false representation and which undoubtedly had the effect of dissuading the bidders from bidding.

Held, the sale should be set aside being vitiated by fraud. (*S. K. Ghose and Patterson, JJ.*) JAGADISH CHANDRA MITRA *v.* KUNJA MOHAN

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SHAH. 171 I.C. 822=10 R.C. 310=A.I.R. 1937 Cal. 273.

——*Sale—Setting aside—Person party to proceedings and failing to stop sale—Right to impeach sale afterwards.*

A person whose property is in danger of being wrongfully sold in execution of a decree by which he is not bound can resort to any of the remedies provided in the Civil Procedure Code. He can prefer a claim under O. 21, R. 58. If his possession is disturbed, he can apply under O. 21, R. 100; he can institute a suit to declare his title and obtain a temporary injunction under O. 39, R. 1, if his property is in danger of being wrongfully sold If the decree was obtained against him by fraud or collusion he could bring a suit to set it aside. If he fails to do so he cannot after the sale plead that the proceedings, though he was a party to them, are not binding on him. If the Court has jurisdiction over the proceedings and they are not vitiated by any irregularity the sale cannot be set aside and the person cannot escape the effect of it. (*Rowland, J.*) BHAGLU MAHTO *v.* RAMAUTAR SAH. 164 I.C. 178=9 R.P. 89=17 Pat.L T. 832=1936 P.W.N. 165=A.I.R. 1936 Pat. 442.

——*Sale—Setting aside—Sale proceedings not supervised by Court.*

If the executing Court does not take any action to satisfy itself that a proper sale of the immovable property is conducted and leaves the entire matter in the hands of its office Nazir, the sale is liable to be set aside. (*Abdul Qayoom, C.J. and Wazir, J.*) JAI RAM *v.* KOTHI SANTA MAL. 42 P.L.R. J. & K 109.

——*Sale — Validity—Absence of attachment before sale—Decree directing property to be considered as under mortgage and judgment-debtor prevented from alienating it.*

Where a decree directs that certain property will be deemed to be under mortgage and that the judgment-debtor will not be entitled to alienate it, it is not necessary that the property should be attached before being brought to sale in execution of the decree. A.I.R. 1918 Lah. 368, Foll. (*Bhide, J.*) MATAB MAL-JINDA SHAH *v.* DARYA RAM GURANDITTA. 164 I.C. 140=9 R.L. 91=A.I.R. 1936 Lah. 573.

——*Sale—Validity—Absence of prior attachment—If ground for setting aside sale.*

The existence of a valid attachment is not a necessary pre-requisite of a valid sale; and the absence of an attachment prior to a sale in execution amounts to no more than a material irregularity and will not, in the absence of proof of substantial injury, be a sufficient ground for setting aside the sale. The absence of attachment does not make the sale void *ab initio*. (*Shankaranarayana Rao, J.*) SOOGOOLAL *v.* SHEIKH HYDER SAB. 14 Mys.L J. 140=41 Mys H.C.R. 218.

——*Sale—Validity—Decree amended—Execution on basis of original decree.*

An amendment was made in a decree as it originally stood and the effect of the amendment was that the decree was not capable of being executed against some of the defendants or their heirs. The decree holder took out execution on the basis of the original decree as it stood before the amendment but were not proceeding against the said defendants or their heirs in accordance with the directions of the High Court.

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Held, that if any error was committed by the decree holders, it was not one of substance but of form and the legality of the execution proceedings should not be allowed to be affected by it. (*Fazl Ali and Luby, JJ.*) RAM PRASAD SINGH *v.* BENI MADHO SINGH. 160 I.C. 678=8 R.P. 380=A.I.R. 1936 Pat. 26.

——*Sale — Validity—Decretal amount subsequently reduced in appeal.*

The title of the purchaser of property in execution of a decree is not affected by the fact that subsequent to the sale the decretal amount is reduced in appeal, when there is nothing to show that the judgment-debtor would or could have paid the smaller amount decreed in appeal and prevented the sale. (*Mitter and Edgley, JJ.*) BARABONI COAL CONCERN, LTD. *v.* DEVA PRASANNA MUKHERJEE. 42 C.W.N. 1032.

——*Sale— Validity— Legal representative of judgment-debtor not brought on record.*

Where a judgment-debtor dies after the issue of a sale notice to him and the sale is subsequently held without his legal representatives being brought on record, the sale is a nullity and the purchaser acquires no right, title and interest by the sale. (*Pollock, J.*) AKOLA CENTRAL BANK *v.* PANDOO. 1940 N L.J. 148.

——*Sale—Validity—Presumption*

When once an execution sale has been held, there is a strong presumption to the effect that it was validly held by a Court which acted in the exercise of its ordinary jurisdiction. The onus would, therefore, lie heavily upon the person seeking to set aside the sale to show that it was in fact illegal. (*Edgley, J.*) SHEIKH TAMIZALI *v.* NASARALI BHUIYA. I.L.R. (1940) 2 Cal. 334=72 C.L J. 66.

——*Sale—Validity—Property in possession of receiver—Sale in execution without leave of Court.*

When the property is in the possession of a receiver it cannot be sold in execution of a decree without the leave of the Court which appointed the receiver. But the person who brings about the attachment and sale of a property in the possession of a receiver appointed by a Court is guilty of contempt of Court and the sale is irregular but not void. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v.* DAYA SHANKAR. 165 I.C 749=9 R.P. 205=18 P.L.T. 301=3 B R. 73=A.I.R. 1936 Pat. 572.

——*Sale—Validity—Sale in execution of money decree without attachment.*

A sale of property in execution of money decree even without attachment is not a nullity. (*Jai Lal, J.*) MUL RAJ *v.* OFFICIAL RECEIVER, JHELUM. 174 I C. 668= 10 R.L 572=A.I.R 1937 Lah. 297.

——*Sale—Validity—Sale without attachment.*

A sale without attachment is not void. (*Bhide J.*) DAULAT RAM *v.* PRITAM SINGH. I.L R. (1940) Lah. 516=188 I.C. 335=12 R.L. 519=A. I.R. 1940 Lah. 78.

——*Sale—Sale without attachment—Validity.*

Sale in execution will not be a nullity even if the property is sold without its being attached. (*Pollock, J.*) SITARAM SHAMRAO *v.* GANPATI MAROTI. 171 I.C. 759=10 R.N. 133=A.I.R. 1937 Nag. 149.

——*Sale—Validity—Sale with wrong legal representative of deceased judgment-debtor on record—If void.*

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An execution sale with a wrong person on the record as the legal representative of the deceased judgment-debtor is not without jurisdiction, when there is nothing to show that the decree-holder has not acted *bona fide*. (*King, J.*) AYINAN CHETTIAR *v.* RAMASWAMY AYYAR. 181 I. C. 83=11 R.M. 771=48 L.W. 395=1938 M.W. N. 902=A.I.R. 1938 Mad. 945=(1938) 2 M L.J. 482.

——*Sale—Validity—Transferable right of share in deity's service.*

Where right to receive a share in the service of a deity is transferable, an alienation of it by the procedure of a Court sale can be brought about provided the class of persons to whom the sale is to be made is a class who would be entitled to perform the services. (*Courtney Terrell, C.J. and Dhavle, J.*) RAMSARAN PANDEY *v.* ISWAR PANDEY. 160 I.C 355=8 R.P. 360=17 Pat.L.T. 77=A.I.R. 1936 Pat. 10.

——Sale—What passes—Property sold by judgment-debtor with direction to vendee to discharge decree-debt out of consideration reserved with vendee—Non-payment of decree-debt by vendee—Sale of property in execution—Rights of purchaser—Lien of judgment-debtor for unpaid purchase-money—Charge—Right of purchaser to enforce against vendee. *See* T. P. ACT, S. 55 (4) (*b*). (1938) 1 M.L.J. 316.

——*Sale—What passes—Right to receive royalty—Right to money not accrued due—If passes.*

Where a right to receive royalty is attached and sold, only the right to the money which has already become due on date of sale is sold, as money which has not become due is not an existing debt. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v.* DAYA SHANKER. 165 I.C. 749=9 R.P. 205=18 P.L.T. 301=3 B.R. 73=A.I.R. 1936 Pat. 572.

Satisfaction.

——*Satisfaction — Application for execution with interest and cost — Decree-holder stating that decree would be satisfied fully, if amount deposited by judgment-debtor in Court was paid, but reserving his right to recover costs—Fresh application for balance—Maintainability.*

A decree-holder applied for execution of his money decree with interest and costs. After prolonged proceedings, the decree-holder stated that in case the amount deposited by the judgment-debtor in the Court for the payment of his decree was paid to him, his decree would be fully satisfied, leaving the costs of the High Court to be recovered by separate execution proceedings. The deposited amount was paid to the decree-holder and the executing Court passed the order 'satisfied.' Subsequently the decree-holder submitted a fresh application for the payment of interest on the decretal amount up to the time of realization.

Held, that by the payment of the amount deposited in the Court, the decree had not been completely discharged. Therefore the executing Court had not become *functus officio* and a fresh application for realization of the balance due to the decree-holder was maintainable. (*Coldstream and Din Mohammad, JJ.*) AMIN CHAND *v.* CHUNI LAL TULSI RAM. 175 I.C. 814=11 R.L. 61=39 P.L.R. 858=A.I.R. 1937 Lah. 733.

——*Satisfaction—Certification of—Mistake in—If justifies further execution.*

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Once a decree has been entered as satisfied due to certain mistake committed by the decree-holder execution cannot be taken out for any sum which may have been left out as long as the order of satisfaction stands. (*Mohammad Noor, J.*) MAHADEB MARWARI *v.* SAILAJA KHANTA. 165 I C. 578 (1)=9 R.P. 193 (1)=3 B.R. 51=1936 P.W.N. 532=A.I.R. 1936 Pat. 416.

——*Striking off—Consigning to record room—Effect of.*

An order 'striking off' an execution application and consigning it to the record room does not terminate the proceedings. (*Thom, C.J., Allsop and Ganganath, JJ.*) BHAN DATT UPADHIA *v* TULSA KUER. I.L.R. (1940) All 246=187 I.C. 313=12 R.A. 515=1940 A L J. 180=1940 A.W. R. (H.C.) 118=A.I.R. 1940 All. 151 (F.B.).

Withdrawal.

——*Withdrawal of proceedings—Right of decree-holder—Order rejecting petition for withdrawal—Revision.*

A decree-holder has not an unqualified and absolute right to withdraw from execution proceedings at any stage. The Court can refuse him permission to do so, where the circumstances are such that some third party has become involved or has acquired some interest. Where the Court rejects the decree-holder's petition to strike off the execution case on the ground that the property advertised for sale has been knocked down and the bid is pending for Court's acceptonce, even if it is wrong in coming to the conclusion that the bidder has acquired some legal interest as regards the property, that is not a matter, which is a fit subject for review under S. 115, C. P. Code. (*Costello and Biswas, JJ.*) SITAL CHANDRA BOSE *v.* ROMESH CHANDRA MITTER. 42 C.W.N. 979=68 C.L.J. 70=178 I.C. 432=11 R C. 360=A.I.R. 1938 Cal. 615.

EXECUTOR. *See* WILLS.

——*Duties of—Contract by testator or intestate—Duty of legal representative to perform.*

Prima facie it is the duty of a legal personal representative to perform all contracts of his testator or intestate, as the case may be that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform it is a different matter, though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute barred debt unless it has been judicially declared to be so. Nor in the case of an enforceable onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and it can never be the duty of an executor or an administrator to commit such an act. (*Lord Romer.*) AHMAD ANGULLIA *v.* ESTATE AND TRUST AGENCIES (1927), LTD. 48 L.W. 127=1938 M.W.N. 774=11 R.P.C. 9=175 I.C. 657=A.I.R. 1938 P.C. 205 (P.C.).

——Execution against. *See* EXECUTION. 1939 Rang.L.R. 694.

——Liability for costs. *See* C. P. CODE, O. 6, R. 17—CHANGE IN THE NATURE OF SUIT. 1940 Rang.L.R. 603.

EXECUTOR.

——*Liability—Equitable mortgage—Executor giving security by deposit of testator's title deeds to one of his creditors—If assumes personal liability for debt.*

Where executors of a deceased debtor for consideration give security by deposit of title deeds over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate and there is no indication that the executors intended to assume personal liability for the secured debt, there is nothing in the Transfer of Property Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's deeds. (*Sir George Rankin.*) SIR JAMSHEDJI JEEJIBHOY *v.* SORABJI BYRAMJI. **67 I.A. 270=I.L.R. (1940) Bom 534 =187 I.C. 773=12 R.P.C 181=I.L.R. (1940) Kar. (P.C.) 179=6 B.R. 623=71 C.L.J. 459= 1940 M.W.N. 706=1940 O.L.R 319=42 Bom. L.R. 719=52 L.W. 32=44 C.W.N. 653=A.I.R. 1940 P.C. 75=(1940) 2 M.L.J. 126 (P.C.).**

——*Liability — Mortgage — Executors giving security for testator's debt—Personal liability for interest.*

In consideration of the creditor's forbearance to sue for a period of two years the executors gave security for the testator's debt by equitable mortgage of the right, title and interest of the testator making it clear at the same time that the payment to the creditor was conditional upon the sufficiency of the assets and depended upon the future of land values. The executors also undertook to pay interest on the debt for the aforesaid period of two years.

Held, that the promise to pay interest not having been expressly qualified, in the context there was not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets, having regard to the limited period of time and the circumstances of the transaction. The executors not having made it clear that their words of promise were not to be taken in the direct and simple sense of a personal convenant made themselves personally liable for the interest which accrued during the two years with interest thereon. (*Sir George Rankin.*) SIR JAMSHEDJI JEEJIBHOY *v.* SORABJI BYRAMI. **67 I.A. 270=I.L.R. (1940) Bom. 534 =187 I.C. 773=12 R.P.C. 181=I.L.R. (1940) Kar. (P.C.) 179=6 B.R. 623=71 C.L.J. 459= 1940 M.W.N. 706=1940 O.L.R. 319=42 Bom.L. R. 719=52 L.W. 32=44 C.W.N. 653=A.I.R. 1940 P.C. 75=(1940) 2 M.L.J. 126 (P.C.).**

——When becomes legal representative. *See* C. P. CODE, S. 2 (11). **1938 A.M.L.J. 91.**

EXPERT—Evidence of.
See (1) EVIDENCE.
(2) EVIDENCE ACT, S. 45.

EXPUNGING OF REMARKS. *See* CR. P. CODE, S. 561-A.

EXPLOSIVES ACT (IV OF 1884), S. 4 and R. 35—*Fireworks—Explosive—Electric sparklets —Possession without licence—Offence.*

Explosive as defined by S. 4 of the Explosives Act is wide enough to include electric sparklets, and possession of the same without licence is an offence under R. 35 of the Act. (*Lakshmana Rao, J.*) SANYASIRAJU *v.* EMPEROR. **189 I.C. 779=1939 M.W.N. 1250=A.I.R. 1940 Mad. 284.**

EXTRADITION ACT (1903), S. 7.

EXPLOSIVE SUBSTANCES ACT (VI OF 1908), S. 7—*"Local Government"—Meaning of—Order made by the Governor—Validity of—If can be questioned in Court.*

An order of consent to a prosecution under the Explosive Substances Act which purports to be made by His Excellency the Governor is an order of the Local Government for purposes of S. 6 and is a valid order of consent. The executive authority, in the Province is vested in the Governor, and the question whether he has consulted the ministers or not in the matter is not a question that can be canvassed in Courts of law. (*Pandrang Row, J.*) LAKSHMIPATHI NAICK *v.* EMPEROR. **180 I.C. 106=40 Cr.L.J. 317=11 R.M. 658=49 L.W. 500=1938 M.W.N. 1171=A.I.R. 1939 Mad. 168=(1939) 1 M.L.J. 426.**

EXTRADITION ACT (XV OF 1903)—Proceedings under—Writ of *habeas corpus*—High Court's jurisdiction to issue. *See* HABEAS CORPUS—WRIT OF. **1938 M.W.N. 1161.**

——**S. 7**—*Arrest without warrant from Political Agent—Legality—Cr. P. Code, S.* 491 (1) (b).

A person who has committed an extradition offence in a state cannot be arrested in British India without a warrant from the Political Agent for such State. If he is so arrested, his detention would be illegal, and the Court can set him at liberty under S. 491 (1) (*b*), Cr. P. Code. (*Din Mohammad, J.*) LEO RAM *v.* EMPEROR. **41 P.L.R. 339.**

——**S. 7**—*Form and contents of warrant.*

No form of warrant is prescribed by the Extradition Act or the rules. It is enough if the extradition warrant clearly describes the offences with which the accused person is charged, and it is not necessary that it should state, when they were committed. If a warrant directs the delivery of the accused person to a frontier police station of a native state, there is sufficient indication of the authority to whom the delivery is to be made. An undated warrant is not illegal, although the better practice is to date it. (*Lord Thankerton.*) C. P. MATTHEN *v.* DISTRICT MAGISTRATE OF TRIVANDRUM. **66 I.A. 222=I.L.R. (1939) Mad 744=41 Bom.L.R. 1119=40 Cr.L.J. 675=1939 A.L.J. 836=70 C.L.J. 270=182 I.C. 551=1939 M.W.N. 744=50 L.W. 48=1939 O.W.N. 602=1939 O.L.R. 433=1939 P.W.N. 581 =12 R.P.C. 4=20 Pat.L.T. 597=I.L.R. (1939) Kar. (P.C.) 324=1939 A.Cr.C. 110=5 B.R. 841=1939 A.W.R. (P.C.) 141=43 C.W.N. 981= A.I.R. 1939 P.C. 213=(1939) 2 M.L.J. 406 (P.C.).**

——**Ss 7 and 8-A**—*Issue of warrant—Question of conditions were complied with—When can be raised.*

Where a warrant is issued by the Agent of the Government of India under S. 7 of the Extradition Act directing that a certain person in British India should be arrested and delivered to the Police of a Native State the question whether the conditions laid down by the Act and the rules for the issue of the warrant were complied with would not be properly the subject of inquiry by the High Court on an application under S. 491, Cr. P. Code, but should be raised before the Magistrate in British India before whom the

person arrested is produced on an application to him to report to the Local Government under S. 8-A of the Extradition Act. (*Lord Thankerton.*) C. P. MATTHEN *v.* DISTRICT MAGISTRATE OF TRIVANDRUM. 66 I.A. 222=I L R (1939) Mad 744=41 Bom.L R. 1119=40 Cr.L.J. 675=1939 A.L.J. 836=70 C.L J. 270=182 I C. 551=50 L.W. 48=1939 O.W.N. 602=1939 M.W.N. 744=1939 O.L R 433=1939 P.W.N 581=12 R.P.C. 4=I.L R (1939) Kar. (P.C.) 324=20 Pat.L.T. 597=1939 A.Cr.C. 110=5 B.R. 841=1939 A W.R. (P.C.) 141=43 C.W.N. 981=A.I.R. 1939 P C. 213=(1939) 2 M.L.J. 406 (P.C.).

——S. 7—*Warrant directing delivery of arrested person to Police of Native State for production before District Magistrate of that state—High Court ordering issue of writ of* habeas corpus—*Application for quashing of order*—Locus standi *of District Magistrate.*

Where a warrant issued under S. 7 of the Extradition Act directed that a certain person in British India should be arrested and delivered to the frontier police station of a Native State for production before a certain District Magistrate of that State, and a High Court in British India ordered stay of execution of the warrant and issued a writ of *habeas corpus* on an application made on behalf of the arrested person:

Held, that the District Magistrate mentioned in the warrant had *locus standi* to file an application for the quashing of the order of the High Court, although he was not a party to the application for the issue of the writ of *habeas corpus*. (*Lord Thankerton*) C. P. MATTHEN *v.* DISTRICT MAGISTRATE OF TRIVANDRUM. 66 I.A. 222=I L.R. (1939) Mad. 744=41 Bom.L.R. 1119=1939 A W R. (P.C.) 141=182 I.C. 551=50 L.W. 48=1939 O.W.N. 602=1939 M.W.N. 744=1939 O.L.R. 433=1939 P.W.N. 581=12 R.P.C. 4=I.L.R (1939) Kar (P.C.) 324=20 Pat.L T. 597=1939 A.Cr.C. 110=5 B.R. 841=43 C.W.N. 981=40 Cr.L.J. 675=1939 A.L.J. 836=70 C.L.J. 270=A.I.R. 1939 P.C. 213=(1939) 2 M.L.J. 406 (P.C).

——S. 7—Warrant under—Powers of High Court under S. 491, Cr. P. Code, with reference to. *See* CR. P. CODE, S. 491 AND EXTRADITION ACT, S. 7. 1939 A.W.R. (H.C.) 737.

——S 22—*Offence in Khairpur State—Lodging information at Sind Police Station—Procedure for search and recovery of property.*

Where an offence has been registered in Khairpur State and State Police Officer lodges information of offence at a Sind Police Station, Sind Police Officers cannot enter a house and search either person or property without the intervention of a Magistrate, nor can they hand over the property searched to the State police without first handing it over to the Magistrate. (*Davis, J.C. and Lobo, A.J.C.*) KARIMULLAH *v.* GHULAM RASULSHAH. 30 S.L.R. 210=165 I.C. 78 (2)=37 Cr.L J. 1068=9 R.S. 78=1936 Cr.C. 868=A.I.R 1936 Sind 153.

——S. 22—*Rules framed under, R. 7—Duty of Political Agent.*

Where it is suggested that the true object of the extradition is to charge the accused person with political offences which would not be extraditable, a bogus trial of the offences in respect of which the extradition is made falls within R. 7 of the Rules framed under S. 22 of the Extradition Act, and makes it the duty of the Political Agent, in such an event, to demand the restoration of the prisoners to his custody. (*Lord Thankerton.*) C. P. MATTHEN *v.* DISTRICT MAGISTRATE OF TRIVANDRUM. 66 I.A 222=I.L.R. (1939) Mad 744=41 Bom.L R 1119=40 Cr L.J. 675=1939 A.L.J. 836=70 C.L.J. 270=182 I C. 551=50 L W. 48=1939 O.W.N. 602=1939 M.W.N. 744=1939 O L R. 433=1939 P.W.N. 581=12 R.P.C 4=I.L R. (1939) Kar (P.C.) 324=20 Pat L T. 597=1939 A Cr C 110=5 B. R 841=1939 A.W.R. (P.C.) 141=43 C.W N. 981=A.I.R. 1939 P.C. 213=(1939) 2 M.L.J. 406 (P.C.).

EZHUVAS OF PALGHAT—If Hindus. *See* HINDU LAW—APPLICABILITY.

FACTORIES ACT (XII OF 1911), S. 2 (4)—*Manufacturing process—Ginning and pressing cotton—Person employed in—If "workman".*

Ginning and pressing cotton is a manufacturing process as defined by S. 2 (4) of the Factories Act; and a person engaged or employed in ginning and pressing cotton is a workman within the meaning of S. 2 (1) (*n*) (ii) of the Workmen's Compensation Act. (*Bose, J.*) SHAIK JAFFER HIPTULLAH BHOY GINNING AND PRESS FACTORY *v.* SHAIK ISMAIL. I.L R. (1937) Nag. 88=A I.R. 1937 Nag 311.

——S. 43—*Bihar and Orissa Rules*, 1936, *R.* 112 (*c*) (5) (i) *and* (iii)—*Construction and scope—If alternative.*

The provisions of R. 112 (*c*) (5) (*i*) and R. 112 (*c*) (5) (*iii*) are not alternative in the sense that if the provisions of sub-R. 5 (*iii*) are observed it is not necessary to observe the requirements of sub-R. 5 (*i*) of R. 112 (*c*) of Bihar and Orissa Factory Rules framed under S. 43 of the Factories Act. The word "or" occurring between one sub-clause and another in R. 112 (*c*) cannot be interpreted in such a way as to make the sub-rules alternative. (*Verma, J.*) GURSARAN LAL *v.* EMPEROR. 5 B R. 207=179 I.C. 170=11 R.P. 333=40 Cr.L.J. 160 (2)=1938 P.W.N. 903=19 Pat.L T. 936=A.I.R. 1939 Pat. 163.

——S. 71—*Claim to exemption from liability—Burden of proof.*

Under S. 71 of the Factories Act, the person who claims the exemption from liability on the ground that he used due diligence and that another person than himself was responsible for the offence, has the onus on him to show that he comes within the provisions of the section. (*Verma, J.*) GURSARAN LAL *v.* EMPEROR. 5 B.R. 207=179 I.C. 170=11 R.P. 333=40 Cr.L.J 160 (2)=1938 P.W.N. 903=19 Pat.L.T. 936=A.I.R. 1939 Pat. 163

——(XXV OF 1934), S. 2 (j)—*Applicability to Cotton Ginning and Pressing Factories Act.*

There is no reason for not importing the definition of the word "factory" under S. 2 (*j*) of the Factories Act of 1934 into the Cotton Ginning and Pressing Factories Act of 1925, which does not define the word "factory" and which deals with specific kinds of factories. A building constructed for the purpose of being used as a factory does not become a factory under S. 9 (3) of the latter Act until it is actually so used. (*King, J.*) THE COMMISSIONER OF LABOUR GOVERNMENT OF MADRAS *v.* RANGANNA GOWD. 1937 M. W. N. 1335.

FACTORIES ACT (1934), S. 2.

——**S. 2 (l), Proviso**—*Managing agent—Meaning of.*

The phrase "managing agent," in proviso to S. 2 (*l*) of the Factories Act does not appear to have any limited technical meaning, but denotes simply an agent who manages a factory. (*Gruer, J.*) HARIBHAO *v.* EMPEROR. **167 I.C. 745=9 R.N. 208 =38 Cr.L.J. 431=19 N.L.J. 247.**

——**S. 2 (1), Proviso**—"*Occupier*"—Munim *or managing agent appointed by owner living elsewhere—Position of—Special contract of service or agency—Onus of proof.*

A person who is employed in a factory as the owner's *Munim* or managing agent and who is the ultimate authority on the spot, the owner himself living elsewhere, is an occupier of the factory within the meaning of the proviso to S. 2 (*l*) of the Factories Act. The word "*Munim*" as commonly used does connote agency, and persons dealing with the chief authority in charge of the factory where it is situated would look upon him as the agent of the owner or occupier. If there is a special contract of service or agency between him and his master, he must prove it (*Gruer, J.*) HARIBHAO *v.* EMPEROR **167 I.C. 745=9 R.N. 208 =19 N L J 247=38 Cr.L.J. 431.**

——**Ss. 37, 39 and 40**—*Applicability—Rules under S.* 43 (2) (d) *exempting factory from provisions of S.* 37—*Exemption, if extends to Ss.* 39 *and* 40—*Men found working at time shown as period of rest in notice under S* 39 (1)—*Offence.*

A factory which is exempt from the provisions of S. 37 of the Factories Act under the rules made under S. 43 (2) (*d*) cannot be held to be exempt also from the provisions of Ss. 39 and 40 of the Act. There is nothing in the Act to show that exemption from the provisions of S. 37 carries with it an exemption from the provisions of Ss. 39 and 40 When therefore several hands are found working in a factory at a time shown as a period of rest in the notice displayed under S. 39 (1), there is a clear breach of the terms of S. 42, and an offence under S. 60 (*b*) (i) is committed. The fact that under the rules the factory is exempt from the provisions of S. 37 does not afford any defence to a prosecution under S. 60 (*b*) (i) read with S. 42. (*Broomfield and Sen, JJ.*) EMPEROR *v.* MISTRY. **I.L.R. (1937) Bom 175=166 I. C. 736=9 R B. 254=38 Cr.L.J. 304=38 Bom.L. R. 1181=A.I.R. 1937 Bom. 52.**

——**S. 60**—*Conviction—Sentence—Necessity for deterrent penalty.*

Penalties in cases against factory owners who are exploiting labour must be deterrent, especially in view of the fact that detection is frequently avoided. (*Gruer, J.*) HARIBHAO *v.* EMPEROR. **167 I C. 745=9 R.N. 208=38 Cr.L.J. 431=19 N. L.J. 247.**

——**Ss. 60 (b) (i), 42 and 81**—*Prosecution for allowing work to proceed beyond time fixed—Plea in defence*—Bona fide *mistake—Protection under S.* 81, *if available.*

Where the manager is prosecuted under S. 60 (*b*) (i) read with S. 42 of the Factories Act for allowing work to be done beyond the prescribed period, it is no defence to plead that the accused acted in good faith honestly believing in the clock in the factory to be correct and that he is protected by S. 81. That section does not apply to a manager; it was inserted primarily, if not entirely for the benefit of the inspecting staff. It cannot

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be said that the manager is acting under the Act. It is enough in a prosecution under the Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that accused intended to infringe the Act or the rules. (*Pollock and Gruer, JJ.*) PROVINCIAL GOVERNMENT, C. P. *v.* SETH CHAPSI. **I L R. (1940) Nag 257=1938 N.L.J. 217=176 I C 866 =11 R N. 90=39 Cr.L.J. 829=A.I.R. 1938 Nag. 406.**

——**S. 63**—*Assistant manager failing to produce register on demand by Inspector—Liability of Manager.*

No sort of vicarious responsibility is recognised by the Factories Act in respect of offences referred to in S. 63 of that Act. Where, therefore, the Inspector asked the assistant manager of a factory to produce the register, and the assistant manager failed to do so and the excuse he gave was that the book was locked up in the room of the manager who had left the office, the manager is not liable to be convicted under S. 63 of the Act for failure to produce the register kept in his custody in pursuance of the Act. The manager would not be guilty of any offence under that section even if he was really hiding himself in the factory in order to avoid meeting the Inspector. (*Henderson, J.*) R. R. DAS *v.* EMPEROR. **41 C.W. N. 740.**

——**S. 71 (1)**—*Procedure under—Discharge of owner or occupier and conviction of actual offender on latter pleading guilty—Legality.*

If a complaint is made by the Inspector of Factories against the manager or occupier of a factory charging him with an offence under the Factories Act, the latter is entitled under S. 71 of that Act to complain against the actual offender, and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against. The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed. Both parties complained against are entitled to cross-examine the prosecution witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence, both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under the Act. S. 71, however, affords him an opportunity of escaping liability, provided he can give satisfactory proof of the matters set out in Cls. (*a*) and (*b*) of S. 71 (1), *viz.*, that he had used due diligence and that the actual offender had committed the offence without his knowledge. The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender would be entitled to call evidence, but not to give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus of positive proof required by S. 71 (1) (*a*) and (*b*), and in all probability he alone is capable of proving certain facts of which proof is thereby required. The Crown which has initiated the proceedings, and has

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throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence. The Magistrate has no power to convict the actual offender or discharge the occupier or manager until the proof envisaged by S. 71 (1) (*a*) and (*b*) is before him, although the former pleads guilty to the charge against him. (*McNair and Khundkar, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* L. N. BIRLA I.L.R. (1940) 1 Cal. 120=12 R.C. 369=185 I.C 319=70 C.L.J. 463=41 Cr.L.J. 164=43 C.W.N. 1223=A.I.R. 1939 Cal. 724.

——S. 71—*Scope and effect—Charge against occupier or manager—Complaint by latter against another--Right of Factory Inspector to cross-examine accused on latter's complaint.*

Where a complaint is lodged by an accused under S. 71 of the Factories Act, the Factory Inspector,as complainant in the original complaint, can cross-examine the accused when he goes into the witness box to prove his own complaint. The effect of S. 71 is that when an occupier or manager is charged and the Inspector proves that an offence has been committed, a special statutory defence open to the occupier or manager, which such statutory defence involves his lodging complaint against a third party which complaint has to be heard at the same time as the original complaint. The two complaints are both in connection with the same offence and must be dealt with together. In the interests of justice the Factory Inspector should have the right to cross-examine a person whom he has charged if that person chooses to go into the witness box to set up a statutory defence. (*Beaumont, C. J. and Sen J.*) EMPEROR *v.* NAROTTAM LALBHAI. I.L.R. (1940) Bom. 420=190 I.C. 270=42 Bom. L.R. 482=A.I.R. 1940 Bom. 265.

——S. 77—*Rules under, R. 72 (1)—Scope—Employee in factory falling in pit containing hot water and dying as result of scalding—Pit fenced on three sides—Fourth side kept open for approach—Pit not ordinarily containing very hot water or injurious substance—Liability of manager.*

The rules framed under the Factories Act do not require that a place, like a pit containing hot water, for silting wood in a rice factory, which is used for the purposes of the factory, should be fenced in such a manner as to be completely unapproachable. It is sufficient if it is fenced in such a way that nobody would cross that way and fall into the pit by accident. Where the pit, which contained hot water and into which an employee in the factory fell and was fatally scalded was fenced on three sides but the fourth side was left open for approach and did not ordinarily contain very hot or other injurious substance.

Held, that the manager was not liable to be convicted for not observing Rule 72 (1) of the Rules framed under the Factories Act and for failing to fence the pit, because, firstly, the pit was fenced and secondly, it was not a pit which ordinarily contained any hot or injurious substance. (*James, J.*) JADU RAM *v.* EMPEROR. 5 B.R. 329=180 I.C. 68=11 R.P. 441=40 Cr.L.J. 316=1939 P.W.N. 133=20 Pat.L.T. 95=A.I.R. 1939 Pat. 46.

FAMILY ARRANGEMENT. *See* HINDU LAW—FAMILY SETTLEMENT.

Binding nature of.
Consideration.
Essentials.
Fairness.
Nature of.
Registration.
Validity.

Biding nature of.

——*Binding nature of.*

A family arrangement is governed by a special equity peculiar to itself and cannot be set aside upon the ground that it was accepted under a misconception of facts or an erroneous view of one's rights or that it had given one party more than he was legally entitled to and would have received if he had taken the judgment of the Court upon it. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) KUSHALSINGH *v.* UTTAMSINGH. 1939 M.L.R. 229 (CIV.).

——*Binding nature of—Agreement to set apart properties for purposes of charity and worship at partition—Validity—Provision for setting apart properties for conduct of* viniyogas*—If a precatory trust — Enforceability—Family trust and public trust—Distinction.*

It is not improper to set apart properties for charity and for acts of worship or religious acts, in a family partition. Such a provision in a family arrangement is a perfectly valid one. The question whether there is a dedication of specified properties for the trust or not is not at all relevant. Such a question may be relevant only if a stranger seeks to enforce the trust, but as between the parties to the agreement, every provision in it is consideration for every other provision. There is no warrant for holding that the provision for setting apart properties for the conduct of certain *viniyogas* is in the nature of precatory trust. On the other hand it constitutes a binding agreement. It is well established in the case of family trusts that the general consensus of the family may put an end to them, in this sense they differ from public trusts. But so long as some members of the family insist that the family trusts should be continued, it is not open to the other members to insist on their discontinuance. It may be that the agreement could be set aside as a whole, if there were proper reasons for doing so, but there is no justification for ignoring some of its provisions. (*Varadachariar, J.*) MANJUNATHA *v.* MUKAMBIKE AMMA. 1937 M.W.N. 162.

——Binding nature of—Joint Hindu family having right to office of trusteeship and mirasi offices in public temple—Partition and arrangement for division—Validity. *See* HINDU LAW—RELIGIOUS ENDOWMENT. A.I.R. 1936 Mad. 294=70 M.L.J. 424.

——*Binding nature of—Will—Oral agreement among sons of testator in supersession of terms of will—Which prevails validity of oral arrangement.*

Where after the death of a testator, his heirs effect an oral arrangement by which they agree among themselves to supersede the will and divide the property of the deceased as on intes-

tacy and the arrangement is acted upon by the parties, such arrangement is valid and prevails as against the will where there is no document made of the family arrangement, and it was made entirely verbally, the oral arrangement, while family property is divided, is not illegal. A suit for a declaration that the family arrangement superseded the will is maintainable, notwithstanding that probate has been duly taken out of the will. (*M. C. Ghose, J.*) GOPAL CHANDRA ADAK *v.* HARIMOHAN ADAK. **62 C.L.J. 380.**

Consideration.

——*Consideration—Settlement of disputes and restoration of peace and harmony in family—Sufficiency.*

The settlement of disputes and the restoration of peace and harmony in the family would be sufficient consideration for a family arrangement. The mere fact that the claim of one of the parties to the dispute might have had greater legal foundation than that of the other does not necessarily show that the dispute was not *bona fide* or that the arrangement was not a proper family arrangement. The *bona fide* settlement of a family dispute does not require any specific consideration to support it. (*Pandrang Row and Venkataramana Rao, JJ.*) RAMASWAMI CHETTIAR *v.* MANIKKAM CHETTIAR. **1937 M.W.N. 1249=11 R.M. 127=47 L.W. 118=176 I.C. 617=A.I.R. 1938 Mad. 236=(1938) 1 M.L.J. 56.**

Essentials.

——*Essentials—Avoidance of future litigation—Beneficent to all parties.*

Where during the lifetime of a widow disputes arose between her, her husband's brother and his nephews and there was almost a certainty of protracted litigation among members of the family and a compromise is entered into with a view to avoid such future litigation by which each of the three parties to it namely the widows her husband's brother and his nephews were benefited, it was held that it amounted to a family arrangement. (*Zia-ul-Hasan and Yorke, JJ.*) CHHATARPAL SINGH *v.* SANT BAKHSH SINGH. **1938 O.A. 573=1938 O.W.N. 711=11 R.O. 11=176 I.C. 958=1938 O.L.R. 353=A.I.R. 1938 Oudh 190.**

——*Essentials of validity — Settlement also effecting settlement of disputes with strangers—Such disputes connected with members of family—If ceases to be family settlement.*

An arrangement, before it can be called a family arrangement or settlement, should have as its principal aim the settlement of the disputes of the family or the preservation of family property or the peace or security of the family or the honour of the family; but it does not necessarily follow that, because over and above these objects, the arrangement also settles other disputes with strangers, which are intimately connected with the disputes of the family, it goes out of the domain of a family settlement. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJUL HAQUE **I.L.R. (1938) All. 125=1938 A.L.J. 23=1938 A.W.R. 98 (H.C.)=174 I.C. 738=1938 A.L.R. 324=10 R.A. 615=A.I.R. 1938 All. 170.**

Fairness.

——*Fairness—Test.*

Family re-settlements executed between father, tenant for life, and son, tenant in tail, the latter being advised by the same solicitor as the former, can be considered reasonable and supported by the Court even though, from a pecuniary point of view, the son's position is greatly prejudiced. A parent can be generous to a son, or legitimate children to an illegitimate one, or a son to a mother upon the occasion of a family arrangement without its being proper or possible in equity, merely on that ground, to suggest that the arrangement is an unfair one and ought to be set aside. (*Lord Maugham.*) MARTIN CASHIN *v.* PETER J. CASHIN **182 I.C. 419=12 R.P.C. 12=1939 M.W.N. 85=A.I.R. 1938 P.C. 103.**

Nature of.

——Nature of—Compromise in suit between members of same family—Decree on compromise relating only to properties in suit—Agreement as to other properties—Effect and binding character of—If family arrangement creating title. *See* REGISTRATION ACT, S. 17 (2). **17 Pat.L.T. 164.**

Registration.

——Registration—Necessity—S. 53-A of the T. P. Act, if applies. *See* T. P. ACT, S. 53-A—APPLICABILITY. **1939 A.W.R. (H.C.) 344.**

Validity.

——Validity—Consideration — Settlement of doubtful claims—Sufficiency. *See* HINDU LAW—WIDOW. **63 C.L.J. 263=A.I.R. 1936 Cal. 392.**

—— *Validity—Essentials*—Bona fides.

Bona fides is of the essence of the validity of a family arrangement, and a family arrangement must be concluded with the object of settling *bona fide* a dispute arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. (*Wadia and Indarnarayan, JJ.*) HARIDAS KISANDAS *v.* NARAYANDAS JAGMOHANDAS. **188 I.C. 545=13 R.B. 1=42 Bom.L.R. 283=A.I.R. 1940 Bom. 181.**

——*Validity—Requirements.*

A family settlement is intended to put an end to a dispute, and its validity does not depend on how far one of the parties would have succeeded had it been agitated in a Court of law. It need not take into account all properties of the family and it is enough, if it concerned itself with the property in dispute. It need not be in writing and registered. (*Mehta, S.M.*) BIBHUTI RAI *v.* MATADIN RAI. **1939 R.D. 2=1939 A.W.R. (B.R.) 106.**

——*Validity of—Test.*

Where family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggsstion of what is false, then, although the parties may have greatly, misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties. In this case it was found that the deed was a family arrangement not tainted even remotely with undue influence and that the deed was generous and could not be set aside. (*Lord Maugham.*) MARTIN CASHIN *v.* PETER J. CASHIN.

FAMILY ARRANGEMENT.

182 I.C. 419=12 R.P.C. 12=1939 M.W.N. 85=A.I.R. 1938 P.C. 103 (P.C.).

——Validity—Upholding and setting aside—Considerations. *See* MINOR — COMPROMISE OF DISPUTES IN FAMILY. 1938 A.L.J. 549=A.I.R. 1938 P.C. 181 (P.C.).

FAMILY SETTLEMENT.

See (1) FAMILY ARRANGEMENT.
(2) HINDU LAW—FAMILY SETTLEMENT.

FATAL ACCIDENTS ACT (XIII OF 1855), S. 1—*Damages—Assessment—Basis of.*

Assessment of damages under the Fatal Accidents Act must necessarily be rough and approximate, but it should not be arbitrary or whimsical. The assessment of damages should not be made merely with reference to the plaintiffs' requirements, but where the evidence establishes that the plaintiffs' requirements were being fairly met by the deceased on whom they were dependent, the Court would be justified in assessing the damages on that basis. (*Varadachariar and Abdur Rahman, JJ.*) PALGHAT COIMBATORE TRANSPORT CO *v.* NARAYANAN. I.L.R. (1939) Mad 306=183 I.C. 279=12 R.M. 252=1938 M.W.N. 1241=48 L.W. 865=A.I.R. 1939 Mad. 261=(1939) 1 M.L.J. 143.

——S. 1—*Assessment of damages—Considerations—Mental suffering.*

Stone, C.J. and Pollock, J.—In assessing damages under the Fatal Accidents Act of 1855, one cannot take into consideration the mental suffering of the survivors. The fact therefore that the widow of the deceased, being a Brahmin, cannot remarry, cannot have children and is thus left at the early age of 16 years a widow for the rest of her life is for this purpose an irrelevant consideration. (*Stone, C.J. and Pollock, J.*) SECRETARY OF STATE *v.* KUKH MINIBAI. I.L.R. (1938) Nag 54 =174 I.C. 401=10 R.N. 386=A.I.R. 1937 Nag. 354.

——S. 1—*Damages—Measure of—Death caused by negligent driving of motor car—Damages—Fixing of—Principles—Proof of pecuniary loss—Necessity—Onus.*

Where a person is run over by a motor car and killed on account of the negligent driving of the car, and the relatives of the deceased sue for damages under the Fatal Accidents Act the rule is that the damages must be fixed solely with reference to the pecuniary loss sustained by the relatives of the deceased in respect of past contributions or in respect of reasonable expectation of future pecuniary benefit from the deceased. The plaintiffs must adduce evidence affording a reasonable basis for the ascertainment of the pecuniary loss so inflicted. If no such evidence is adduced, and there is no proof of any pecuniary loss, no compensation can be awarded (*Cornish and Varadachariar, JJ.*) STANES MOTORS, LTD. *v.* VINCENT PETER. 59 Mad 402=1936 M.W.N. 543=161 I C 192=8 R.M. 799=43 L.W. 327=A I.R. 1936 Mad. 247=70 M.L.J. 155.

——S. 1—*Damages—Measure of—Determination—Considerations.*

In assessing the damages which have to be awarded in respect of a fatal accident under the Fatal Accidents Act, many factors have to be considered in arriving at the amount which the claimant or dependant of the deceased is entitled to in respect of his or her future maintenance. The possibility of his or her early death, the possibility of the deceased dying from other causes and the possibility of the deceased losing the employment on which he was engaged and being unemployed have all to be considered. The defendant is not entitled to a sum calculated on a number of years from the moment of her loss. Allowance must also be made for the fact that the defendant is receiving a lump sum. (*Gentle, J.*) KUPPAMMAL *v.* M. & S. M. RY. CO., LTD. I.L.R. (1938) Mad. 233=174 I.C. 270=10 R.M. 688 =1937 M.W.N. 921=46 L.W. 452=A.I.R. 1938 Mad. 117.

FEDERAL COURT RULES, O. 8, R. 1.

——S. 1—*Expectation of life—Actuarial tables provide good basis of calculation.*

In cases arising under Fatal Accidents Act, actuarial tables of Insurance Company afford a good basis for calculation of "normal expectation of life" of the deceased. (*Tek Chand and Dalip Singh, JJ.*) MT. KOSHALIA *v.* RIAZ-UD-DIN. 162 I.C. 336=8 R.L. 882=A.I.R. 1936 Lah. 362.

——S. 1—*Person dying as result of motor accident—Deceased proved to have been guilty of negligence—Right of heirs to sue for damages.*

In a suit by the heirs of a deceased dying as a result of motor accident, for recovery of damages under the Fatal Accidents Act, although the deceased is proved to have been guilty of negligence, nevertheless, the claim in the suit will succeed, if the effect of the deceased's negligence could have been avoided by the exercise of reasonable care on the part of the driver of the vehicle. (*Page, C.J. and Ba U, J.*) SAGHIRUL HASSEN *v.* RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. 163 I.C. 957=9 R.R. 54=A.I.R. 1936 Rang. 295

——S. 1—Suit for damages against several wrongdoers—No joint tort—Joint decree against all—If justified. *See* TORT—NEGLIGENCE. 1938 M.W.N. 1241.

——S. 1—*Wrongful act, neglect or default—Compound wall allowed to continue in defective state—Omission to carry out necessary repairs—Fall of wall causing death of persons using adjoining latrine—Damages—Liability for.*

Whilst the erection of a wall upon land is an ordinary user of the land, nevertheless it is an uncommon occurrence for a wall to fall, and when it does fall an explanation should be forthcoming from those who are responsible for its repair. Where the owner of the wall fails to carry out the necessary repairs which are required, allowing it to get into a serious defective condition, he fails to use ordinary care and skill, and is guilty of a breach of duty and neglect. If as a result the wall falls and cause death to persons using a public latrine built against the wall and adjoining it, the owner of the wall is liable in damages to the wife, husband or children of the persons killed under S. 1 of the Fatal Accidents Act. (*Gentle, J.*) KUPPAMMAL *v.* M. & S. M. RY. CO., LTD. I.L.R. (1938) Mad. 233=174 I.C. 270=10 R.M. 688=1937 M.W.N. 921=46 L.W. 452=A.I.R. 1938 Mad. 117.

FEDERAL COURT RULES, O. 8, R. 1 and O. 15, R. 4—*Applicability—Application in revision—Application for leave to proceed with as pauper—Proper procedure—Power of Court and of Registrar.*

FEDERAL COURT RULES O. 9 R. 1.

The rules framed by the Federal Court do not expressly refer to applications in revision; but the Court under its inherent powers can apply the analogy of the provisions prescribed for appeals. In the case of an application for leave to continue a revision application *in forma pauperis*, O. 15, R. 4 of the rules does not apply, and it would not be appropriate to the Registrar to start an investigation into the petitioner's alleged pauperism at once; it would be more convenient if the application for leave to proceed as a pauper is put up before the Court along with the main application for revision. If the Court after hearing the applicant or his counsel sees no objection to entertain the revision, it may either dispense with the enquiry into pauperism or order a fresh inquiry to be made either by itself or by the High Court. O. 8, R. 1 of the Federal Court Rules which gives the Registrar the powers of the Court in respect of applications for leave to appeal as pauper cannot be availed of in the case of revision applications. (*Sulaiman, J.*) PASHUPATI BHARTI *v.* SECRETARY OF STATE. **1938 P.W.N. 582.**

——**O 9, R. 1**—Scope and effect—Appeal to Federal Court—Printing charges—Time for payment fixed in O. 45, R. 7 (1), C. P. Code—Power of Court to extend. *See* C P. CODE (AS AMENDED IN 1920), O. 45, R. 7 (1), AS APPLIED TO FEDERAL COURT APPEALS. **1939 P.W.N. 807 (F.B.).**

——**O 9, R. 2**—*"Date of signing of the decree"—Meaning of.*

(*Harries. C.J. and Fazl Ali J.*) *Quaere.*—Whether the words "date of signing of the decree" appearing in O. 9, R. 2 of the Federal Court Rules mean something different from the "date of the decree", appearing in O. 45, R. 7 (1), C. P. Code, as applied to Federal Court appeals. (*Harries, C.J , Fazl Ali and Agarwala, JJ*) LACHMESHWAR PRASAD SUKUL *v.* GIRDHARI LAL. **19 Pat. 123=185 I C. 353=6 B R. 159=12 R.P. 353=3 Fed. L J. (P. II) 1 (F.B)=1939 P.W.N 807=20 Pat. L T. 905=A.I.R. 1939 Pat 667 (F.B.).**

——**O 10, Rr. 1, 2 and 3**—*Scope—Compliance with—Power of Court to dispense with—Certificate by High Court under S.* 205 (1) *of Government of India Act—Appeal not declared admitted by High Court for failure to make deposit under O. 45, R. 7 in time—Jurisdiction of Federal Court to allow appeal to be lodged.*

There is nothing in Ch. I, Part IX of the Constitution Act to suggest that the parliament did not intend the Federal Court to have the amplest power over its own procedure; it ought to be the exclusive prerogative of the Federal Court to decide whether a litigant has done anything to forfeit his right to prosecute his appeal. Whenever the justice of the case requires it, the Federal Court is entitled to excuse applicants from compliance with so much of O. 10 of the Federal Court Rules as requires them to have the record prepared and printed in the High Court and to lodge their petition of appeal in the Federal Court within 60 days of the admission of the appeal by the High Court. The absence of any admission of the appeal by the High Court, by reason of the failure of an appellant to make the deposit required by O. 45, R. 7 within time, is not a statutory bar to the prosecution of the appeal before Federal Court. The provisions of O. 45 are procedural provisions only and non-compliance with them in the High Court would not necessarily oust the jurisdiction of the Federal Court if a certificate under S. 205 (1) of the Government of India Act has once been given.

FEDERAL COURT RULES O. 36, R. 2

Sulaiman, J.—There is no provision empowering the High Court to revoke the certificate or dismiss the application unless an inherent jurisdiction can be invoked, though the appeal cannot be admitted by the High Court so long as its order refusing to extend the time to make the deposit under O. 45, R. 7 stands. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) LACHMESHWAR PRASAD SHUKUL *v.* GIRDHARI LAL CHAUDHURI. **I L.R. (1940) Kar. (F C.) 1=187 I.C. 670=12 R F.C. 33=1940 O.L.R. 300=1940 P. W N 260=3 Fed. L J. 15=21 Pat. L T. 309=1940 M.W.N 464=42 P L.R. 312=71 C.L.J. 327=6 B R. 543=A.I R. 1940 F.C. 26.**

——**O. 10, Rr. 3 and 5**—Applicability—Special reference under O 33—Procedure. *See* FEDERAL COURT RULES, O. 33. **1938 P.W.N. 609.**

——**O. 15, R. 4**—Applicability—Application in revision—Application for leave to continue as pauper—Procedure—Registrar's power to investigate at once. *See* FEDERAL COURT RULES, O. 8, R. 1 AND O. 15, R. 4. **1938 P.W.N. 582.**

——**O. 21, R 2**—Applicability—Special reference under S. 213, Government of India Act—Procedure as to pleadings, etc. *See* FEDERAL COURT RULES, O. 33. **1938 P.W.N. 609.**

——**O. 33**—*Reference under—Procedure as to pleadings, etc—Concise statements of facts, arguments and authorities—If to be filed—O.* 10, *Rr.* 3 *and* 5—*O.* 21, *R.* 2

The provisions of O. 21, R. 2 of the Federal Court Rules as to pleadings and their contents cannot obviously be applicable to a special reference under S. 213 of the Government of India Act which is governed by O 33 of the rules, although the preliminary steps would be somewhat identical. As provided by R. 2 of O. 33, the parties can be required to furnish statements of facts as arguments as well. It would be more appropriate to require the parties to furnish concise statements of the facts of the case and of the argument and authorities upon which they propose to rely at the hearing as provided in Rr. 3 and 5 of O. 10 of the Federal Court Rules. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, *In the matter of.* **1938 P.W.N. 609.**

——**O. 36, R. 2**—*Scope—Special reference under S.* 213, *Government of India Act, re: validity of Act of one Province—Right of other Provinces to be heard—Terms—Powers of Court to impose.*

In a reference under S. 213 of the Government of India Act as to the validity of an Act of a Provincial Legislature, in which no other Province is directly concerned and to which no other Province is made a party (no notice also being served), it cannot be said that the other Provinces ought to be joined in the reference or that their presence before the Court is necessary under O. 17, R. 3 of the Federal Court Rules. The other Provinces are not therefore strictly governed by O. 36, R. 2 of the Rules. But in order to enable the Advocates-General of other Provinces to put their points of view, if their

FEDERAL COURT RULES, O. 37, R. 1.

Provinces are indirectly interested in the reference, O. 36, R. 2 of the Rules makes a special provision for them to apply to be heard. If they so desire to be heard they should file statements, arguments and authorities, and would be subject to any order as to costs which the Court can, and may think fit to pass after the reference has been heard. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, *In the matter of.* 1938 P.W N. 609.

——O. 37, R. 1—*Power of Federal Court to excuse compliance with rules—Scope of—Exercise of such power—Mode of.*

Per *Sulaiman, J.*—The two parts of R. 1 of O. 37, although included in the same rule, are really separate and distinct. The first deals with the exemption of the parties from compliance with any of the requirements which have been expressly laid down in the Federal Court Rules. The second reserves general power to give directions in matters of practice and procedure as considered just and expedient. It follows that in all cases where the Rules are silent this last provision can appropriately be resorted to. But, of course, that would not entitle the Federal Court to excuse compliance with the rules of the code made applicable by the Adaptation of Order.

Per *Gwyer, C.J.*—Although rules of Court are framed to be kept and not to be broken, they are framed for the purpose of assisting justice and not for the purpose of enabling it to be defeated. If therefore a strict adherence to the rules is likely to deprive a litigant of advantages which the Provincial Legislature clearly intended to give him, then the Federal Court may properly exercise the dispensing power conferred by O. 37, in order that substantial justice may be done. But the Federal Court can only excuse compliance with its own rules and cannot excuse compliance with rules of a High Court and still less with the provisions of a statute. In this case the Federal Court excused the applicants from compliance with so much of O. 10, Rr. 1, 2 and 3 of the Federal Court Rules as required them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the High Court.] (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.,*) LACHMESHWAR PRASAD SHUKUL *v.* GIRDHARI LAL CHAUDHURI. I.L.R (1940) Kar. (F.C.) 1=187 I.C. 670=12 R.F.C. 33=1940 O.L.R. 300=1940 P.W.N. 260=3 Fed.L.J. 15=21 Pat.L.T. 309=1940 M.W.N. 464=42 P.L.R. 312=6 B.R. 543=71 C.L.J. 327=A.I.R 1940 F.C. 26.

FERRIES ACT (XVII OF 1878), Ss. 25 and 16—*Ferry* ghat *also provided by Railway as* ghat *for taking goods arriving at station—Person taking goods therefrom in his own boat without paying toll—If guilty of offence.*

Where a *ghat* of a Public Ferry is also provided by the Railway authorities as the *ghat* from which goods arriving at the station can be taken therefrom in boats by any member of the public, a person in using it to take his own goods in his own boat from the *ghat* is not using the ferry *ghat* so as to render himself liable to the payment of toll and in refusing to pay toll he is not guilty of any offence under S. 25 of the Ferries Act. Nor is he guilty of an offence under S. 26 of the Act. (*Jack, J.*) JALADHAR BHATTACHARJYA *v.* SUBAL CHANDRA MAHISYA DAS. 41 C.W.N. 1348.

FIRST INFORMATION REPORT. *See* CRIMINAL TRIAL—FIRST INFORMATION REPORT.

FISHERY.

FISHERY—*Bengal—Rennell's Map—Value of.*

For the purpose of defining the boundary between jalkars, to fix a spot on the bank of the river by Rennell's Map is to make a very proper use of Rennell's Map to show the courses of rivers was the main purpose of his survey. For the exact position of mouzas his map cannot claim equal accuracy, and for defining the boundaries of mouzas or estates its accuracy is still less. (*Sir George Rankin.*) PRAMATHA NATH RAY *v* NANI LAL ROY. 168 I.C. 6=31 S.L.R. 350=41 C.W.N. 748=9 R P.C. 261=18 Pat.L.T. 423=3 B.R. 466=1937 O.L.R. 269=1937 A.L.R. 356=A.I.R. 1937 P.C. 148 (P.C.).

——*Grant of right—Navigable and non-navigable rivers—Crown's right in England and India.*

In England the right of the Crown to grant a several fishery to a private individual is restricted in a twofold manner. The river must be both tidal and navigable and the grant must be proved or presumed to have been made not later than the reign of King Henry II. for the Magna Charta took away the King's prerogative to make such grants. In India there is no limitation in respect of time and the river need not be tidal. It is enough if it is navigable. The Crown in India can also grant a several fishery to a private individual in non-navigable rivers or in *beals* and land-locked waters as an incorporeal right apart from the right to the subjacent soil. (*Mitter and Akram, JJ.*) PRAVABATI *v.* SECRETARY OF STATE FOR INDIA. 44 C.W.N. 1017.

——*Right to follow shifting river and its adjuncts*—Beal *in dying bed—When ceases to be part of river.*

The grantee of a fishery has the right to follow a shifting river in the enjoyment of his exclusive fishery so long as the waters may be considered a part of the river system including in that expression the adjuncts of the river whose connection with it is of such a permanent character as would establish the identity of the waters as a part of the river system.

Per *Rau, J.*—The effect of the decided cases has invariably been that when a river is in process of shifting its bed, a *beal* in the dying bed is not a part of the river unless it is connected with the river throughout the year and not merely in the rainy season. In other words, the *beal* ceases to be part of the river as soon as the ground between the dying bed and the live bed is sufficiently high to be above water in the dry season. (*Nasim Ali and Rau, JJ.*) RAJNANDINI DEBI *v.* MONMOTHA PAL. 44 C.W.N. 1079.

——*Tidal navigable river—River shifting course—Right to follow new channels or adjuncts formed by change of course.*

A grantee of fishery rights in a tidal navigable river can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system, within the up-stream and down-stream limits of his grant. The right extends to such adjuncts of the river as are in communication with it, not occasional or seasonal, but either continuous or at least of

such a permanent character as would establish the identity of the waters as a part of the river system. (*Mukerji and S. K. Ghose, JJ.*) JNANENDRAMOHAN BHADURI *v.* RANJIT PAL CHAUDHURY. **63 Cal. 351.**

FOREIGN ADJUDICATION as insolvent—Attachment of movable property in British India before and after adjudication—Rights. *See* C. P. CODE, S. 64. **50 L.W. 701=A.I.R. 1940 Mad. 47=(1939) 2 M.L.J. 859.**

FOREIGN JURISDICTION. *See* C. P. CODE, S. 13.

FOREIGN JURISDICTION ACT (1890)—Extension of C. P. Code under—Effect. *See* C. P. CODE, S. 17—APPLICABILITY. **39 Bom. L. R. 1287.**

FOREST ACT (XVI OF 1927), S. 25—*Presupposes recognition of existing rights—Restrictive alternatives—If proper.*

S. 25 pre-supposes the existence of public rights of way before a forest is reserved and also pre-supposes that such public rights of ways are recognized; and the powers given to deal with them are exceptional powers hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. The alternatives referred to cannot however be clogged with any restriction such as the imposition of a transit fee for cattle. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I.L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

——**Ss. 26 (d) and 55**—*Offence under S. 26 (d)—Confiscation of cattle—Legality.*

Cattle are instrumental in the theft of grass which they eat and in the damage to grass and young trees which they cause in grazing and such cattle used in committing an offence under S. 26 (*d*) of the Forest Act are as much liable to confiscation as cattle drawing a cart containing illicitly felled timber. (*Grille, J.*) EMPEROR *v.* MOHAMAD KHAN. **I.L.R. (1939) Nag 226=11 R.N. 32=39 Cr.L J. 700=175 I.C. 795=A.I.R. 1938 Nag. 365.**

——**S. 26 (d)**—*Scope—Cattle uncovered by passes grazing in reserve forest—Owners of cattle—Liability of—Intention—Proof.*

Owners of cattle cannot be made criminally liable for the acts of the grazier unless their intention is proved to be so. Where, therefore, some cattle are found grazing in the reserve forest without the necessary passes, the owners of such cattle cannot be made criminally liable for the acts of the grazier unless it is proved that the intention of the owners is also to allow the cattle to graze in the reserve forest without passes. The intention can be gathered from the fact that the cattle uncovered by passes are accompanied by cattle covered by passes. (*Grille, J.*) EMPEROR *v.* WAMANRAO. **I.L.R. (1937) Nag. 536=168 I.C. 469=9 R.N. 257 (2)=38 Cr.L.J. 588 (1) =A.I.R. 1937 Nag. 169.**

——**S. 52**—*Removal of timber seized under—Conviction for theft—Finding as to ownership—Need for.*

Under S. 52 of the Forest Act, the forest produce alone can be seized in relation to which a forest offence is believed to have been committed, and no forest offence can be said to have been committed in relation to any forest produce unless it is definitely established that that produce belonged to Government. Consequently, to sustain a conviction for theft under S. 379, I. P. Code, for the removal of timber seized under S. 52 of the Forest Act, it is essential for the Court to come to a finding that the timber belonged to Government. (*Din Mohammad, J.*) GULABU *v.* EMPEROR. **184 I.C. 427=12 R.L. 222 =41 P.L.R. 423=41 Cr.L.J. 10=A.I.R. 1939 Lah. 469.**

——**S. 55**—*Scope and object of—Master's liability for acts of servant in cases of cattle trespass into Government forest.*

The object of the legislature in enacting S. 55 of the Forest Act is to make the owner liable to a certain extent for the acts of his servant, civilly, not criminally. In the case of cattle trespassing in Government forest unless duly licensed, the master cannot be criminally liable for the acts of his grazier in taking his cattle into such forest, unless he permits the cattle so to graze by some overt acts or by some negligent omission. Where a large herd of cattle is entrusted to a youth and two children, in the vicinity of a closed forest, it might be held to amount to such negligence as to suggest connivance at a breach of the law. (*Grille, J.*) EMPEROR *v.* MOHAMAD KHAN. **I.L.R. (1939) Nag. 226=11 R.N. 32=39 Cr.L.J. 700=175 I.C. 795=A.I.R. 1938 Nag. 365.**

——**S. 76**—*Rules dealing with trees not belonging to Government—Validity.*

Any rule made by the Provincial Government under S. 76 of the Forest Act which deals with the disposal of trees not belonging to Government will be clearly *ultra vires*. (*Din Mohammad, J.*) GULABU *v.* EMPEROR. **184 I.C. 427=12 R.L. 222=41 P.L.R. 423=41 Cr.L.J. 10=A.I.R. 1939 Lah. 469.**

FORFEITURE ACT (IX OF 1859), S. 20—*Scope and effect of—If still in force and unaffected by Act VIII of 1868—Limitation for purposes of S. 20—Starting point.*

S. 20 of the Act to provide for the adjudication of claims to property seized as forfeited, requires, that persons who have any claim that they are the owners of property which has been confiscated as the property of another, should bring such a claim within one year from the attachment or seizure of the property which they claim. Though Act VIII of 1868 has repealed various sections of the Act of 1859, S. 20 of the latter Act is not affected by the Act VIII of 1868, and the application of S. 20 is permanent, because it was intended to be a permanent bar against subsequent suits in Civil Courts, and hence has remained in force up to the present day. Limitation for the purposes of the section begins to run from the date of attachment which in those days took the form of a *parwana* being issued to Sub-Inspector of Police for the attachment of the property. (*Bennet and Verma, JJ.*) KUNJLAS KUNWAR *v.* KRISHNA DEO SINGH. **187 I.C 185 =12 R. A 487=1939 A.L.J. 1079=1939 A.W.R (H.C) 920=A.I.R. 1940 All. 121.**

FRAUD. *See* PRACTICE—PLEADINGS.

——*Benami transaction—Fraudulent intention—Proof required.*

In benami transactions tangible facts must be proved from which a legitimate inference of fraudulent intention can be drawn. The Court's

decision must not rest upon mere suspicion. The Courts are required to be astute in the detection of fraud; they are not justified in arriving at a finding of fraud on grounds which do not show more than its possible existence. When the acts of parties admit of a reasonable interpretation in favour of honesty and fair dealing, the Courts should receive it rather than arrive at a finding of fraud on mere suspicion. (*Nasim Ali and Bartley, JJ.*) JAGADAMBA PROSAD *v.* BADRI PRASAD. 171 I.C. 522=10 R.C. 276=A.I.R. 1937 Cal. 203.

———*Cause of action—Test for determination.*

In an action for damages based on deceit, the intention to deceive is not necessarily an intention to injure or cheat. If a person makes a statement to another which he knows to be untrue and he does so with a view to induce such another to enter into the contract, there is sufficient basis for an action of deceit provided that the person to whom the statement is made relies upon the false statement. (*Sir George Rankin.*) UNITED MOTOR FINANCE CO. *v.* ADDISON AND CO. 166 I.C. 790=45 L.W. 179=1937 O.W.N. 144=1937 M.W.N. 97=1937 A.W.R. 177=1937 A.L.J. 244=41 C.W.N. 482=9 R.P.C. 171=18 Pat. L.T. 281=1937 P.W.N. 246=1937 O.L.R. 100=3 B.R. 323=65 C.L.J. 177=1937 A.L.R. 197=39 Bom.L.R. 706=A.I.R. 1937 P.C. 21=(1937) 1 M.L.J. 432 (P.C.).

———*Effect of—Person assigning decree to another to defraud creditor—Suit by, to declare that assignment is benami—Maintainability.*

Where a person has assigned his decree to another person with a view to avoid attachment of that decree by his creditor, he cannot subsequently ask the Court for a declaration that the assignment was benami. The Court cannot relieve him from the consequences of his own fraud. (*Harries, C.J. and Manohar Lall, J.*) KISAN RAM MARWARI *v.* GODAWARI DEBI. 189 I.C. 423=13 R.P. 85=6 B.R. 801=A.I.R. 1940 Pat. 379.

———Evidence of—Sale-deed — Inadequacy of consideration—If evidence of fraud — Setting aside for fraud—Principles. *See* DEED—SETTING ASIDE. 40 C.W.N. 561.

———*Finding of—Inference from circumstances in absence of direct proof—When justified.*

It is well settled that where fraud is to be inferred from circumstances and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases. (*Fazl Ali and Meredith, JJ.*) RAJA SINGH *v.* CHAICHOO SINGH. 185 I.C. 816=12 R.P. 423=6 B.R. 262=20 Pat.L.T. 957=A.I.R. 1940 Pat. 201.

———*Fraud on power—Meaning of frau dtherein.*

The term 'fraud' used in connection with frauds on a power does not necessarily denote any conduct on the part of the appointer amounting to fraud in the ordinarily understood meaning of the word. It only means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. (*Thomas, J.*) ALI RAZA KHAN *v.* NAWAZISH ALI KHAN. 1938 O.A. 845=1938 O.W.N. 1157.

———*Legal and moral fraud—Distinction.*

Fraud is not defined in any enactment but it has a very well-understood meaning. It is always a question of fact and a matter of inference from evidence led in the case, and because the evidence which yields the inference of fraud cannot be specified beforehand it is impossible to define legal fraud. There is no distinction in law between legal fraud and moral fraud. To make a man liable for fraud, moral fraud must be proved against him. (*Young, C.J. and Ram Lall, J.*) UMRAO BEGUM *v.* RAHMAT ILAHI. I.L.R. (1939) Lah. 433=41 P.L.R. 843=186 I.C. 77=12 R.L. 351=A.I.R. 1939 Lah. 439.

———*Party to fraud—Right to relief on basis of fraudulent scheme to delay creditors—Duty of Court to refuse relief.*

A plaintiff who has taken part in a fraudulent scheme to delay a creditor and carried it out with considerable success cannot afterwards ask the Court to help him to recover properties conveyed by him to the defendant in pursuance of that scheme. There is no distinction in this respect between a fraud to defeat a creditor and a fraud to delay a creditor. It is the duty of every Judge to be astute to prevent a party from making use of the machinery of the Court by fraudulent schemes either to defeat or delay his creditors, and, when he is shown to have embarked on such schemes, to refuse any assistance to him in carrying them to completion. (*Reilly, C.J. and Singaravelu Mudaliar, J.*) NAGABHUSHANA BHATTA *v.* SEETHAMMA. 18 Mys.L.J. 409.

———Plea of—Competency—Party to fraud—If can plead own fraud—Fraud not carried out. *See* BENAMI—FRAUDULENT TRANSFER. 44 L.W. 294=A.I.R. 1936 Mad. 717 (F.B.).

———*Plea of—Party, if can plead his own fraud.*

The ordinary rule is that where fraud has not been carried into execution it may be pleaded by a party to it. But where during the execution of a decree, some of the judgment-debtors object to the execution of the decree alleging that the decree-holder assignee was in fraudulent collusion with one of them as against the others, but the objectors themselves allege that they acquiesced in the previous two applications for execution because the decree-holder assignee had promised them a share of the sale proceeds if the sale succeeded, it amounts to carrying the fraud into effect and the objectors are estopped from pleading that they are not bound by the rules of *res judicata* and are also entirely estopped from pleading their own fraud. (*Mosley and Mackney, JJ.*) K. M. ESOOF *v.* HAMIDA BIBI. 163 I.C. 671=9 R.R. 43=A.I.R. 1936 Rang. 218.

———*Plea of—Precise and specific details—Duty of Court.*

Where a litigant prefers the charges of fraud or other improper conduct against the other party, the tribunal, which is called upon to decide such issues should compel that litigant to place on record precise and specific details of these charges. Cases of such type will be much simplified if this practice is strictly observed and insisted upon by the Court, even if no objection is taken on behalf of the parties who are interested in disproving the accusation. (*Lord Russell of Killowen*) BHARAT DHARMA SYNDICATE, LTD. *v.* HARISH CHANDRA. 64 I.A. 143=I.L.R. (1937) All. 566=41 C.W.N. 746=168 I.C. 620=18 Pat. L.T. 421=9 R.P.C. 311=1937 O.W.N. 631=1937 A.L.R. 432=3 B.R. 543=1937 O.L.R. 327=1937 M.W.N. 744=31 S.L.R. 306=39 Bom.L.R. 963=

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1937 A.W.R. 832=46 L.W. 745=1937 P.W.N. 1027=A.I.R. 1937 P.C. 146=(1937) 2 M.L.J. 650 (P.C.).

——*Plea of—Suit for possession on basis of sale-deed—Plea by defendant that it was executed to defraud decree-holder—Sustainability.*

It is well-settled law that if a document is brought into existence to commit a fraud, the party who intends committing the fraud will not be allowed in the Court of justice to repudiate it if fraud was actually committed by means of that deed. Where, therefore, a sale-deed was executed by the defendant in favour of the plaintiff in order to save the property from the clutches of a decree-holder, and the fraud was committed on the decree-holder, the defendant cannot thereafter be allowed to challenge the deed and the title of the plaintiff in a suit by him to recover possession of the property on the basis of the sale-deed. (*Mahomed Noor, J.*) DWARKA RAM *v.* MT. JALESWARI. 167 I.C. 874=9 R.P. 441 (1)=3 B.R. 359=A.I.R. 1937 Pat. 453.

——*Plea of—Suit for possession on basis of sale-deed—Sale-deed executed to defeat pre-emption—Suit, if liable to be dismissed.*

Any person who comes to seek relief from a Court of law should not be a party to a fraud and if both parties are *in pari delicto* the Court should decline to help either party and let things remain as they are and let both parties reap the consequences of their own fraud and dishonesty. Where, therefore, a sale deed was fictiously executed to defeat a claim for pre-emption and the suit for pre-emption was dismissed on the strength of such deed, a suit by the ostensible vendee or his heir for recovery of possession of the property on the basis of the sale-deed is liable to be dismissed. (*Sulaiman, C.J. and Bennet, J.*) NAWAB SINGH *v.* DALJIT SINGH. 58 All. 842=162 I C 958=8 R A 921=1936 A.W.R. 290=1936 A.L.J. 285=1936 All.L.R. 524=A.I.R. 1936 All 401.

——*Policy of law—Two equally innocent or equally guilty persons.*

Of the two innocent persons or equally guilty persons if the law has to make its choice as whom to penalise, the law will choose the person whose indiscretion has enabled the fraud and favours him who is in possession. (*Din Mohammad, J.*) GHULAM FATIMA *v.* GOPAL DEVI. A.I.R. 1940 Lah 269.

——*Proof—Basis of finding—Inference of fraud from mere fact of unfairness of bargain—If justified.*

A Court is of course entitled to go into the question of fairness or otherwise of a bargain to ascertain whether that bargain was induced by fraud, and the evidence as to unfairness may assist the Court in coming to a conclusion upon the credibility of the witnesses dealing with the question of fraud. If, however, direct evidence on the question of fraud is wholly unreliable, a Court cannot possibly base a finding of fraud purely on a finding that the transaction was unfair. From the mere fact that it was an unfortunate bargain for a party a Court cannot infer that fraud has been practised. (*Harries, C.J. and Manohar Lall, J.*) HARIHAR PRASAD SINGH *v.* NARSINGH PRASAD SINGH. 19 Pat. 669.

—— Proof—Imputation of fraud to rich person in good position—Strict proof—Necessity—Burden of proof. *See* INSURANCE—LIFE ASSURANCE POLICY. 41 Bom.L.R. 353.

FRAUDULENT PREFERENCE.

——*Proof of—Requirements.*

The Judicial Committee accepted the statement of law by Niamatullah, J., in the case under appeal that the party alleging fraud was bound to establish it by cogent evidence and that suspicion could not be accepted as proof and that unless the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they could not be accepted as affording sufficient proof of fraud. (*Lord Thankerton.*) HANSRAJ *v.* DEHRA DUN-MUSSOORIE ELECTRIC TRAMWAY CO., LTD. 187 I.C. 787=13 R.P.C. 1=1940 A.W.R. (P.C.) 82=51 L.W. 721=1940 O.A. 395=1940 O.W.N. 451=42 P.L.R. 343=21 Pat L.T. 497=6 B.R. 650=1940 O.L.R. 348=1940 M.W.N. 952=A.I.R. 1940 P.C. 98 (P.C.).

——*Relief—Party to fraud—Right to relief.*

A plaintiff cannot ask for relief against his own fraud. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSHUNNESSA. 181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.

——Suit to set aside decree on ground of—Maintainability—Conditions—Proof of fraud extrinsic to proceedings—Necessity. *See* DECREE—SETTING ASIDE. 48 L.W. 946.

——*Test of—Compromise—Agreeing to prayers not tenable according to law—Fraud, if can be inferred.*

It is open to parties to a litigation to agree to prayers of the opposite side being granted even though they may not be tenable strictly according to law, but it will be very unsafe to say that such action constitutes fraud. (*Harper, S.M. and Sathe, J.M.*) THAKRA *v.* TIKA RAM. 1940 R.D. 222=1940 A.W.R. (B.R.) 87.

FRAUDULENT PREFERENCE.

See (1) PRESIDENCY TOWNS INSOLVENCY ACT, S. 56.
(2) PROVINCIAL INSOLVENCY ACT, S. 54.
(3) T. P. ACT, S. 53.

——Company—Director being creditor obtaining undue preference over other creditors—Liability of transaction to be set aside. *See* COMPANY—DIRECTOR. 40 C.W.N. 769.

——Essentials—Hindu family—Partition award—Gift of properties to unmarried daughters—Provision made for payment of debts—Right of creditors to impeach—Absence of fraudulent intent—Effect. *See* HINDU LAW—FAMILY SETTLEMENT. 17 Mys.L.J. 116.

——*Transfer by debtor—Essentials of—When fraudulent—Tests—Motive of debtor.*

In dealing with the question as to whether certain transfer made by a debtor is made with a view to give fraudulent preference to the transferee over other creditors, what is always to be borne in mind is what the dominant motive of the debtor is in making the transfer or payment in question. If his dominant motive is either to save himself from exposure of criminal prosecution or to secure some particular advantage for himself, such as to enable himself to carry on his business, and the transfer is made as a result of pressure brought by the transferees for payment of their dues, the transfer or payment cannot be said to amount to fraudulent preference. (*Ba U and Mackney, JJ.*) P. M. CHETTYAR FIRM *v.* A.

FRAUDULENT PREFERENCE.

K,A.C.T.A L. CHETTYAR FIRM. **162 I.C. 115=8 R.R. 536=A.I.R. 1936 Rang. 129.**

——*Transfer with intention of defrauding creditor—Fraud effected—Transferor continuing in possession after transfer—Dispossession by transferee under fraudulent deed—Transferor, if entitled to restoration of possession.*

Where a person fictitiously transfers his immovable property to another with the intention of defrauding his creditors and the contemplated fraud is effected, no Court of Law would help him to recover possession of the property. But where the transferor was all along continuing in actual possession after the transfer and the transferee illegally ousts him and enters into possession under the shadow of the fraudulent deed, he will not be allowed to do so and possession will be restored to transferor. A.I.R. 1927 Rang. 86, Rel. on (*Ba U, J.*) HAFIZULLA KHAN *v.* ALLY MULLA KHAN. **164 I.C. 914=9 R.R. 144=A.I.R. 1936 Rang. 405.**

FRAUDULENT TRANSFER.

See (1) DEEDS.
(2) FRAUDULENT PREFERENCE.
(3) FRAUD.

FRONTIER CRIMES REGULATION (III OF 1901), S. 38—*Accused entering house of woman with deadly weapon—Private person's right of arrest.*

Where there is reasonable doubt that an accused had entered the house of a woman, not known to be of low character, to commit a cognizable offence and the accused whose identity is not known is armed with a deadly weapon, the accused can be arrested by any person and even done to death, if necessary, under the provisions of S. 38, Frontier Crimes Regulation. Under such circumstances the accused has no right of private defence. (*Almond, J.C. and Mir Ahmad, A.J.C.*) MOHTASHAM ASLAM *v.* EMPEROR. **171 I.C. 346=10 R.Pesh. 32=39 Cr.L.J. 35=A.I.R. 1937 Pesh. 92.**

FUNDAMENTAL RULES, Ch. VIII, R. 54 (a)—*'Honourably acquitted"—Meaning of.*

A person cannot be said to have been 'honourably acquitted' within the meaning of R. 54 (*a*), Chapter VIII of the Fundamental Rules, if he is acquitted merely because the facts proved did not bring him within the letter of the law. (*Srivastava, Ag. C.J. and Zia-ul-Hasan, J.*) DUBRI MISIR *v.* DISTRICT BOARD, FYZABAD. **12 Luck. 725=165 I.C. 583=9 R.O. 232=1936 O.W.N. 1102=1936 O.L.R. 667=A.I.R. 1937 Oudh 45.**

GANJAM AGENCY TRACTS—*Mamools or customary payments—Law as to—If a matter of executive administration.*

It cannot be held that the administration of mamools or customary payments in the Agency tracts is a matter entirely for the executive to undertake and that legality can be given to the obligation for such payment only by the executive, when there is no evidence to warrant such an inference. (*Venkataramana Rao, J.*) NEELAKANTA RAJENDRA PATRO *v.* BALAJI PATTOMUNDOLO. **173 I.C. 524=10 R.M. 638=1937 M.W.N. 1047 =46 L.W. 442=A.I.R. 1937 Mad. 945.**

GANJAM AND VIZAGAPATAM AGENCY RULES, R. 55—*Interlocutory orders—Order of Assistant Agent refusing amendment—Revision by Agent—Interference.*

GENERAL CLAUSES ACT (1897), S. 6.

R. 55 of the Agency Rules is widely drawn and the Agent to the Governor has power to revise interlocutory orders passed by the Assistant Agent, *e.g.*, orders refusing amendment of plaint. If he refuses to revise on the ground that he has no jurisdiction to revise such orders, he wrongly refuses to exercise a jurisdiction possessed by him and the High Court will set aside his order. (*Leach, C.J. and Madhavan Nair, J.*) KANNAYYA *v.* LAKSHMIDEVI. **182 I.C. 417=12 R.M. 75=47 L.W. 692=1938 M.W.N. 575=A.I.R. 1938 Mad. 708=(1938) 1 M.L.J. 813.**

GARNISHEE PROCEEDINGS—Joint debt—Garnishee order in respect of. *See* C. P. CODE, O. 21, R. 46. **41 C.W.N. 1074.**

GENERAL CLAUSES ACT (X OF 1897), S. 3 (7)—'British India'—Berars, if included in. *See* C.P. CODE, S. 17—APPLICABILITY. **39 Bom.L.R. 1287.**

——**S. 3 (25)**—*Applicability—Bazar dues.*

Bazar dues constitute a benefit arising out of the land and therefore a lease of bazar dues is a lease of immovable property within the meaning of S. 3 (25) of the General Clauses Act. (*Thomas, C.J. and Bennett, J.*) RAM JIAWAN *v.* HANUMAN PRASAD. **190 I.C. 143=1940 A.W.R. (C.C.) 357 =1940 O.L.R. 535=1940 O.A. 746=1940 O.W. N. 782=A.I.R. 1940 Oudh 409.**

——**S. 3 (28)**—*"Local authority"—If includes port-trust.*

The words "local authority" in S. 3 (28) of the General Clauses Act include a port-trust. The words "legally entitled to or entrusted by the Government with the control or management of a municipal or local fund" qualify the words "or other authority," immediately preceding them and do not relate to a municipal committee, District Board or body of Port-Commissioners. (*Beasley, C.J. and Gentle, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* TRUSTEES OF THE PORT-TRUST, MADRAS. **I.L.R. (1937) Mad. 178=166 I.C. 427 =9 R.M. 375=1936 M.W.N. 690=44 L.W. 328= A.I.R. 1936 Mad. 789.**

——**S. 3 (52)**—*'Mark'—If includes expression 'Sahi' written at the foot of a document.*

The writing of a word or expression as 'Sahi' at the foot of a document cannot be considered to be a 'mark' made by that person under S. 3 (52) of the General Clauses Act, in the absence of proof that in fact the particular person was unable to write his own name. (*Hamilton, J.*) RAGHUBIR SINGH *v.* SUKHRAJ KUAR. **14 Luck. 393=179 I C. 596=11 R.O. 190=1939 O.L.R. 57=1939 O.W.N. 1=1939 A.W.R.(C.C.) 7=1939 O. A. 128=A.I.R. 1939 Oudh. 96.**

——**S. 5 (3)**—Scope of—If can be invoked to construe the word 'date' in R. 54 (3) (Allahabad) of O. 21, C. P. Code. *See* C. P. CODE, O. 21, R. 54 (3) Allahabad. **1939 A.L.J. 7=A.I.R. 1939 All. 154.**

——**S. 6**—*Law of limitation—Amendment, if can divest right vested under previous law.*

A new law of limitation or an amendment in the law cannot divest a person of a right or title which has vested in him under the previous law of limitation. (*Rachhpal Singh and Collister, JJ.*) TEJ BAHADUR *v.* RADHA KISHAN GOPI KISHAN. **166 I.C. 182=9 R.A. 370=1936 A.L.J. 1373= 1936 A.W.R. 1044=1936 A.L.R. 1009=A.I.R. 1936 All. 858.**

GENERAL CLAUSES ACT (1897), S. 6.

——S. 6—*Rights accrued under old act—How affected.*

According to S. 6 of the General Clauses Act the rights that have become secured under the old Act cannot be the subject of fresh re-examination in the light of subsequent legislation. (*Mehta, J.M.*) IBNI HUSAN *v.* GOODAR. 1939 A.W.R. (B. R.) 41=1939 A.L.J. (Supp.) 49=1939 R.D. 303.

——(as mended in 1936), S. 6-A—Effect on S. 7, Criminal Law Amendment Act. *See* CRIMINAL LAW AMENDMENT ACT (1932), S. 7. (1938) 2 M.L.J. 863.

——S. 6 (e)—*Applicability and scope.*

S. 6 (*e*) applies to those cases only where a previous law has been simply repealed and there is no fresh legislation to take its place. Where an old law has been merely repealed then the repeal would not affect any previous right acquired nor would it even affect a suit instituted subsequently in respect of a right previously so acquired. But where there is a new law which not only repeals the old law, but is substituted in place of the old Act, S. 6 (*e*) of the Act is not applicable. (*Sulaiman, C.J. and Bennet, J.*) DANMAL PARSHOTAM DAS *v.* BABU RAM CHHOTE LAL. 58 All. 495=160 I.C. 277=8 R.A. 588=1935 A.W.R. 1268=1935 A.L.J. 1245=1936 All. L.R. 76=A.I.R. 1936 All. 3.

——S. 9—*Applicability—Decree or order of Court—Direction to party to deposit amount in Court within fifteen days from date of decree—Interpretation of—Date of decree—If to be excluded—Intention of Judge—If material.*

S. 9 of the General Glauses Act, it is true, would not apply in terms to a decree or order of Court, but it is desirable that for the sake of uniformity the same interpretation should be given to an expression occurring in a judicial order as would be given to it in a statute. Where a decree passed by a Court on 23-1-1936, directed that the defendant should "pay in Court Rs. 200 within 15 days from this day", and the defendant deposited the amount on 7-2-1936.

Held, that the expression "fifteen days" would mean fifteen clear days, and that the date of making the order, namely, 23-1-1936 should be excluded, consequently the deposit was in time and sufficient.

Held, further, that whatever might be the intention of the Judge who made the order, it was to be made out from the expression used, and what was material was the meaning of the expression used and not the intention of the Judge. (*Divatia, J.*) RAMACHANDRA *v.* LAXMAN. I.L.R. (1938) Bom. 734=40 Bom. L.R. 892=178 I.C. 78=11 R.B. 145=A.I.R. 1938 Bom. 447.

——S. 10—*Applicability—Compromise decree—Provision for payment in instalment—Date of instalment falling on Court holiday—Payment on reopening day—Sufficiency.*

S. 10 of General Clauses Act applies to a case in which an act is allowed or ordered to be done by an Act of the legislature; it does not apply to an act ordered to be done by a compromise decree. A compromise decree is nothing more than a contract, and is none the less an agreement between the parties though there is superadded the command of a Judge; and time is of the essence of that contract. Where the time fixed for payment of an instalment of the amount due expires on a day which is a Court holiday, the judgment-debtor cannot invoke S. 10 of the General Clauses Act, and claim to pay it on the day the Court reopens. (*Wort and Varma, JJ.*) RAM KINKAR SINGH *v.* KAMAL BASINI DEVI. 17 Pat. 191=177 I.C. 881=11 R.P. 194=5 B.R. 32=19 Pat. L.T. 825=A.I.R. 1938 Pat. 451.

——S. 22 (5)—*"Duly made"—Interpretation—If refer to confirming powers of Government.*

S. 22 (5) of the General Clauses Act lays down that on the final publication in a Government Gazette where previous publication has been ordered, the publication in the Gazette by the orders of Government of a completed rule or bye-law is conclusive proof that the bye-law has been made in accordance with the procedure laid down in the appropriate Act for the making of that bye-law. That is what the words "duly made" mean, and S. 22 (5) has no application to the confirming powers of Government. The words "duly made" have no reference to such powers but only to the machinery specified for the making of the bye-law. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. 167 I.C. 777=9 R.N. 218 (2)=38 Cr. L.J. 459=19 N.L.J. 195.

——S. 25—Scope and effect—If controls Sugarcane Act—Offence under rules under Sugarcane Act—Imprisonment in default of fine—Power of Court to award. *See* SUGARCANE ACT, S. 7 (3) 17 Pat. L.T. 806.

GENERAL ORDERS BY GOVERNOR-GENERAL IN COUNCIL, No. 179, S. 7—

Application of—Land given under licence, resumed under S. 6.

Where land is originally taken under a license in accordance with the General Order by the Governor-General in council, No. 179, and is resumed in accordance with the terms of that licence, since paying compensation for land resumed under S. 6 is neither purchase nor hire, S. 7 of the same order has no application. (*Young, C.J. and Monroe, J.*) SHAMAS-UL-NIHAR FAZAL ELAHI *v.* SECRETARY OF STATE. 164 I.C. 1046=9 R.L. 187=A.I.R. 1936 Lah. 582.

GIFT. *See also* (1) HINDU LAW—GIFT.
(2) MAHOMEDAN LAW—GIFT.
(3) T.P. ACT, S. 123.

——*Construction—Giving of exclusive control to donee, and donor to be maintained—Right, if any, left in the donor.*

Where a father-in-law by a registered instrument gives exclusive control to his daughter-in-law over his properties, with the only reservation that he has to be maintained during his lifetime and to ensure which, his name is left in the papers, the transfer is a gift in the full sense of the word. As such, the donor has no property left in him over which he could create any interest in favour of any one subsequently. (*Mehta, J.M.*) BALDEO PANDE *v.* MT. MUNESHAR. 1939 A.W.R. (B.R.) 45=1939 R.D. 175.

——*Date of—Presumption—Gift by mutation in revenue records—Minor donee—Necessity of possession.*

In the case of a gift made by mutation in the revenue records, the presumption is that the donor made the gift on the date of his application for mutation. Where the donee is a minor and is living with the donor, the question of possession is not material. (*Bhide, J.*) MAL SHAH *v.* JABRU.

GIFT.

179 I.C. 804=11 R.L. 640 (2)=40 P.L.R. 621=A.I.R. 1938 Lah. 794.

———*Delivery of possession—Absence of—Effect—No privity of interest between the donor and donee.*

Where a donee does not enjoy that privity of interest which exists between persons like a grandmother and a grandson or a father and a minor son, in such a case if the donor makes a gift but does not pass possession of the property to the donee, then the interest in favour of the donor begins to run against the donee. (*Marsh, S.M. and Mehta, J.M.*) SALIK RAM SINHA *v.* JANKI TEWARI. 1939 R.D. 312=1939 A.W.R. (B.R.) 130=1939 A.L.J. (Supp.) 81.

———*Gift subject to payment of donor's debts—Position of donee.*

If a gift is made subject to the payment of the debts of the donor, the donee accepting the gift cannot retain the benefit and at the same time repudiate the burden. (*Tek Chand and Abdul Rashid, JJ.*) RAM SARUP *v.* SHIV DAYAL MEHRA. 42 P.L.R. 307=A.I.R. 1940 Lah. 285.

———*Undue influence*—Bona fide *purchaser for value—Protection—Volunteer, position of.*

Where a gift is tainted by undue influence and imposition of the person procuring the gift, even an innocent third party cannot retain the gift, if he is a mere volunteer. But if he is a purchaser for value without notice there is no obligation of restitution on his part. (*Nasim Ali and Mukherjea, JJ.*) FORMAN ALI MIJI *v.* UZIR ALI SHEIKH. 175 I.C. 712=10 R.C. 817=66 C.L.J. 125=42 C.W.N. 14=A.I.R. 1938 Cal. 157.

———*Validity—Imperfect gift followed by appointment of donee as executor.*

An imperfect gift followed by the appointment of the donee as executor, the intention to give continuing, entitles the donee to the property. (*Lord Maugham.*) MARTIN CASHIN *v.* PETER J. CASHIN. 182 I.C. 419=12 R.P.C. 12=1939 M.W.N. 85=A.I.R. 1938 P.C. 103 (P.C.).

———*Validity—Delivery of possession deferred till happening of certain event.*

The mere fact that the transferor when conferring an absolute estate directed that the property shall not be made over to the donee till after the happening of a certain event could not affect the validity of gift, for such direction is either inoperative or even if operative could not make the gift itself invalid. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) BIRDICHAND *v.* DEEPA. 1939 M.L.R. 92 (Civ.).

———*Validity—Gift of lease contrary to conditions laid down in lease—Lessor declaring gift to be invalid—Gift not legally cancelled—Effect.*

A lease of certain Government lands contained a clause that the lessee had no authority to sub-let, sell, donate or mortgage or otherwise dispose of or deal with the lease interest without the consent of the Government and that if he did so, the same would be void. The lessee desiring to make a gift of his properties to his sons and wishing to include the Government lease therein wrote to the Government for permission, but without waiting for the permission to be obtained, executed gift deeds in favour of sons individually and included therein the Government lease among other properties. The Government asked to be furnished with a draft of the proposed gift deeds and stated that permission would be granted subject to certain conditions. The lessee having ultimately failed to obtain the necessary consent, caused cancellation deeds to be prepared and apparently sent a copy to the Government. The Government returned the same and wrote to the lessee that the gift deeds previously executed were invalid. The gift deeds were however never in fact cancelled.

Held, that the Government having avoided the attempted gifts, those donations were void and did not operate as a valid assignment of the tenant's interest in the lease. Therefore no property passed to the donees under the deeds though they may not have been legally cancelled. (*Lord Porter.*) JAYAWARDENE *v.* JAYAWARDENE. 182 I.C. 770=12 R.P.C. 18=50 L.W. 87=41 P.L.R. 717=A.I.R. 1939 P.C. 138 (P.C.).

GOLD COAST CRIMINAL CODE, S. 330—*Sedition—Incitement to violence—If necessary ingredient—Extrinsic evidence of intention—Necessity for.*

It is in the Criminal Code of the Gold Coast Colony and not in English or Scottish cases that the law of sedition for the colony is to be found. S. 330 of that Code must, therefore, be construed in its application to the facts of a case free from any glosses or interpolations derived from any expositions however authoritative of the law of England and Scotland. Nowhere in that section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result. Further it is not necessary that there must be some extrinsic evidence of intention outside the words themselves to prove seditious intention as defined in the section. If the words are seditious by reason of their expression of a seditious intention the seditious intention appears without any extrinsic evidence. (*Lord Chancellor.*) WALLACE JOHNSON *v.* THE KING. 187 I.C. 2=12 R.P.C. 146=1940 P.W.N. 250=1940 M.W.N. 354=1940 A.C. 231=1940 O.L.R. 188=6 B.R. 450=41 Cr.L.J. 411=44 C.W.N. 403 (P.C.).

GOVERNMENT—Adverse possession against—Claim to proprietary rights—Burden of proof. *See* ADVERSE POSSESSION. A.I.R. 1937 All. 622.

GOVERNMENT OF BURMA ACT (1935), S. 85—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Interference. *See* C. P. CODE, S. 151. A.I.R. 1938 Rang. 241.

———S. 124 and Official Trustees Act (II of 1913), Ss. 6 and 7—*Applicability of S. 124 of the Government of Burma Act—Suit against official trustee.*

In order to attract S. 124 of the Government of Burma Act, the suit must be brought in respect of an act done or purporting to be done in the execution of his duty as a servant of the Crown. The official trustee is a corporation sole with a perpetual succession, according to S. 6 of the Official Trustees Act. A corporation cannot be a servant of the Crown although the members of the corporation may well be. S. 124 appears among a number of sections (123 to 129), which deal with the special rights of persons who are

GOVT. OF BURMA ACT (1935), S. 124.

servants of the Crown and plainly refer to natural persons only and not to artificial persons. When the acts of the official trustee complained of are done during the course of administration of the trust as an ordinary trustee under S. 7 (1) (*a*) of the Official Trustees Act, his acts cannot be said to be done 'in the execution of his duty as a servant of the Crown' and hence the consent of the Governor is not necessary in respect of a suit against such a trustee for breaches in respect of a private trust. (*Roberts, C.J. and Dunkley, J.*) OFFICIAL TRUSTEE *v.* MRS. RAEBURN. **1940 Rang.L.R. 273=A.I.R. 1940 Rang. 207.**

——S. 124—*Protection of Crown servants.*

S. 124 of the Government of Burma Act purports to be a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the commencement of the Act. The protection given by this section is in addition to the existing protection given by S. 197 of the Cr. P. Code. (*Mosely, J.*) RAI MOHAL PANDEY *v.* MAUNG PO SEIN. **1938 Rang L.R. 116=175 I.C. 360=39 Cr.L.J. 565=10 R.R. 487=A.I.R. 1938 Rang. 189.**

——S. 124 (2)—*Duty of committing Magistrate.*

Under S. 124 (2) of the Government of Burma Act, it is the duty of the Magistrate to take the available evidence and come to a finding whether the acts complained of were done or not done in good faith before he decides whether to commit the accused. (*Mosely, J.*) RAI MOHAL PANDEY *v.* MAUNG PO SEIN. **1938 Rang.L.R. 116=175 I.C. 360=39 Cr.L.J. 565=10 R.R. 487=A.I.R. 1938 Rang. 189.**

GOVERNMENT OF BURMA ADAPTATION OF LAWS ORDER (1937), Cl. 10—

'Right' and 'Privilege'—Interpretation.

The words "right, privilege, objection or liability already acquired, accrued or incurred" in the Government of Burma Adaptation of Laws Order, 1937, must have reference not to the mere enjoyment of what is in fact a boon or to the existence of being in fact under a disadvantage, but to rights and privileges, objections or liabilities which are enforceable at law.

Per *Dunkley, J.*—Cl. 10, Government of Burma Adaptation of Laws Order, 1937, must be construed strictly and the words 'right' and 'privilege' must be given their legal meaning. In law a 'right' is an advantage which can be enforced by appropriate action before a Court, and a 'privilege' is nothing more than a special right enjoyed by certain persons, beyond the rights which the public in general enjoy. Accordingly the right to have a suit stayed is in law neither a right nor a privilege. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) ARUNACHALAM CHETTYAR *v.* VALLIAPPA CHETTYAR. **1938 Rang. L.R. 176=175 I.C. 275=10 R.R. 474=A.I.R. 1938 Rang. 130 (F.B.).**

——Cl. 10—*Scope of.*

S. 10 of the Government of Burma Adaptation of Laws Order of 1937 refers clearly to substantive rights acquired and not to mere matters of procedure in which rights cannot be acquired. (*Baguley and Mosely, JJ.*) K. K. K. M. CHETTYAR *v.* SELLAMI ACHI. **1938 Rang L R. 355=179 I.C. 374=11 R.R. 313=A.I.R. 1938 Rang. 385.**

GOVERNMENT OF BURMA (ADAPTATION LAWS) ORDER, 1937, Para. 9 and

GOVT. OF INDIA ACT (1915), S. 30.

Government of Burma Act, Ss. 148 and 149—*Scope and effect of—Execution of decree of—Native State—Laws as to, if affected.*

The Power of the Courts in Burma to execute a decree of a Native Prince or State in India, arises from the notification of the Government of India under S. 44, C. P. Code, as it stood prior to its amendment. The effect of para. 9 of the Adaptation of Laws Order and Ss. 148 and 149 of the Government of Burma Act, is only to continue in force the law with reference to such executions as it existed immediately before the commencement of the Government of Burma Act, because such law has not been altered, repealed or amended by the legislature or other competent authority. Hence any decree of a Native State in India to which the notification under S. 44, C. P. Code, applies can still be executed in Burma after separation though that State may not, after the amendment of S. 44, C. P. Code, be a Native State within its meaning. (*Roberts, C.J. and Braund, J.*) M.M.K. KUTTAYAN CHETTYAR *v.* V.E.R.M.K. KRISHNAN CHETTYAR. **1938 Rang. L.R. 463=177 I.C. 634=11 R.R. 155=A.I.R. 1938 Rang 352.**

GOVERNMENT OF INDIA ACT (1915), S. 30—

Contract under—Conditions of validity—Form of—Formal deed or indenture—Necessity—Contract by correspondence — Requirements of validity.

There is no justification for holding that a contract in order that it may comply with S. 30 of the Government of India Act must be by deed, *i.e.*, under seal. There is no such provision in S. 30; the section does not require a formal document in the nature of an indenture or deed. The contract under S. 30 must, in order to be binding, be made on behalf and in the name of the Secretary of State for India in Council by the Local Government and executed by the proper officer authorised by the Governor-General in Council. A contract in the form of letters, complying with the provisions of S. 30 and signed by the proper officer, would be a contract complying with the terms of S. 30. But it must be plain that the correspondence is carried on on behalf of and in the name of the Secretary of State, and that the contract as finally concluded by correspondence is executed by a person authorised by resolution in that behalf. Where the correspondence does not show that, but only amounts to the fact that the Collector is prepared to recommend to Government to sanction a proposal, which if sanctioned would be made on behalf of and in the name of the Secretary of State in Council, there is no binding agreement under S. 30 which can be specifically enforced. (*Beaumont, C.J. and Blackwell, J.*) SECRETARY OF STATE *v.* BHAGWANDAS GOVERDHANDAS. **40 Bom.L.R. 19=174 I.C. 316=10 R.B. 438=A.I.R. 1938 Bom. 168.**

——(as amended in 1919). S. 30—*Scope—Mandatory nature of—Contract on behalf of Secretary of State — Enforceability—Conditions of.*

The provisions of S. 30 of the Government of India Act, 1915, are mandatory and must be strictly complied with in order to constitute a valid contract which can be enforced against the Secretary of State. The contract must, under the law and the rules in force, be by a deed

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executed on behalf of the Secretary of State and in his name by the proper authority. (*Broomfield and Wassoodew, JJ.*) KRISHNAJI NILKANT *v.* SECRETARY OF STATE. 172 I.C. 451=10 R.B. 279=39 Bom.L.R 807=A I.R. 1937 Bom. 449.

——S. 30 (2)—*Mining rules, R.* 46—*Construction and scope—Mining lease—Requisites of validity—Absence of formal lease—Effect of—"Right of the applicant" in R.* 46—*Meaning of.*

Under S. 30 (2) of the Government of India Act, 1919, contract of mining leases have to be executed by the person and in the manner prescribed by the Government of India, and in order to be valid, a mining lease has to be executed by the Collector under the rules prescribed by the Governor-General in Council. Until a formal lease has been executed there can be no enforceable contract against the Secretary of State for India in Council. The words "right of the applicant" in R. 46 of the Mining Rules cannot be read as a recognition of a vested right. The effect of the rule is merely this, that if the applicant does not complete the contract within six months, the order directing the lease to issue will lapse unless the time is extended. (*Leach, C.J. and Lakshmana Rao, J.*) SANKARA MINING SYNDICATE, LTD. *v.* SECRETARY OF STATE. 183 I.C. 839=12 R.M. 375 =48 L.W. 194=1938 M.W.N. 718=A.I.R. 1938 Mad. 749=(1938) 2 M.L.J. 141.

——S. 32—*Acts of Courts—Liability of Secretary of State.*

The Secretary of State is not liable for acts of the Courts or the consequences of those acts. A person has, therefore, no cause of action against the Secretary of State for wrongful seizure and sale of his property by a Magistrate for payment of a fine inflicted on another person. (*Bennet, J.*) BATESHWARI PRASAD *v.* THE SECRETARY OF STATE FOR INDIA. 167 I.C. 309=9 R.A. 521=1936 A.W.R. 1277=1937 A.L R. 170=A.I.R. 1937 All. 158.

——S. 32—*Act of Indian Legislature excluding right of resort to Civil Court—If* ultra vires.

An Act excluding the subject's right of resort to the Civil Courts is not *ultra vires* of the Indian Legislature. S. 32 of the Government of India Act does not affect the validity of an Act which creates an obligation and provides an exclusive code for its determination; such an obligation is not covered by sub-S. (2) of S. 32. (*Lord Thankerton.*) THE SECRETARY OF STATE *v.* MASK AND Co. 67 I.A. 222=I.L.R. (1940) Mad. 599=188 I.C. 231=1940 M.W.N. 610=52 L W. 1=71 C. L.J. 576=6 B.R. 731=1940 O.L.R. 367=42 Bom. L.R. 767=1940 O.W.N. 679=13 R.P C. 12=1940 O.A. 725=1940 A.W.R. (P.C.) 132=44 C.W.N. 709=A.I R. 1940 P.C. 105=(1940) 2 M.L.J. 140 (P.C.).

——S. 32—*Scope—Right of action against Government.*

Section 32 which relates to parties and procedure, does not limit or bar the right of action of a person entitled to a right against Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued. If the service under the Crown would not have been at pleasure of Crown the remedy by suit against the Secretary of State in Council for a breach of contract of service would have been available to the person aggrieved owing to his wrongful dismissal from service. 5 Bom. H.C.R. App. 1, Ref. (*Lord Roche.*) VENKATA RAO *v.* SECRETARY OF STATE. 64 I.A. 55=I.L.R. (1937) Mad. 532=65 C.L.J. 231=39 Bom.L.R. 699=1937 A.L.R. 91= 166 I.C. 516=45 L.W. 146=1937 A.W.R. 132= 1937 O W.N. 116=1937 M.W.N. 103=18 Pat.L. T. 132=1937 A.L.J. 213= 9 R P.C. 148 (2)=41 C.W.N. 554=1937 P.W.N. 150=1937 O.L.R. 49 =3 B.R. 241=A.I.R. 1937 P.C. 31=(1937) 1 M. L.J. 529 (P.C.).

GOVT. OF INDIA ACT (1915), S. 45.

——S. 32 (2)—*Suit against Secretary of State —Maintainability—Test.*

Per *Braund, J.*—So far as suits against the Secretary of State in Council are concerned, in India, it is a complete fallacy to attempt to consider them from the point of view of the English Common law which does not recognize actions against the Crown on the principle either that "the Crown can do no wrong" or that the King cannot be sued in his own Court. The principle applicable in India is wholly different; for, not only has the Crown submitted itself by statute (through its character as the successor of the East India Company) to certain 'remedies,' but it has by S. 65, Government of India Act, 1858, constituted a corporate defendant in the form of the Secretary of State in Council as its representative for the purpose of being sued in respect of those remedies. In the result, therefore, the East India Company, and, through the Company, the Secretary of State in Council, is, by virtue of S. 65, Government of India Act, 1858, and of S. 32 of the Act of 1919, in a wholly different position from the Crown as it stands under the English Common law. When, therefore, S. 32, Government of India Act, 1919, came to be enacted all it did was to preserve and re-enact, the position that all individuals in India were, as against the Crown, as the "successors-in-government" of the East India Company in India, to be able, as a matter of jurisdiction in the Crown's own Courts, to sue the Crown through its established representative, the Secretary of State in Council, in all those classes of cases, without reference to particular cases at all, in which, the East India Company might have been sued prior to 1858. It is the 'character' of the suit, and not whether it would have succeeded, that is the test. If it is of that 'character' that it would have lain against the East India Company, then by statute it lies against the Secretary of State for India in Council. (*Roberts, C.J., Dunkley and Braund, JJ.*) SECRETARY OF STATE *v.* MAURICE. 1937 Rang L.R. 35= 168 I.C. 272=9 R.R. 348=A I.R. 1937 Rang. 89 (S.B.).

——S. 32—Tort of servant employed in Government Hospital—Liability of Secretary of State for damages. *See* TORT—DAMAGES. 49 L.W. 679 =(1939) 1 M.L J. 784.

——S. 45—*Scope—Powers of Government of India—Mining lease—Power to grant—Mining Rules, R.* 4—*Order delegating to Board of Revenue—Order of Local Government reversing grant by Board of Revenue—If* ultra vires.

Where the power to grant a mining lease has been delegated by the Local Government to the Board of Revenue under R. 4 of the Mining Rules framed by the Government of India, the statutory authority to grant mining leases passes from the Local Government to the Board of Revenue, and the Local Government can neither grant a mining

lease nor reverse the order of the Board of Revenue granting a lease. If the Local Government so reverses the order of the Board, its act is *ultra vires*, and the Government of India has full powers under S. 45 of the Government of India Act to set aside the order of the Local Government. The Local Government cannot direct the Board of Revenue to grant a mining lease to a particular individual. All that it can do is to direct the Board that a particular area should be assigned on a mining lease. (*Leach, C.J. and Lakshmana Rao, J.*) SANKARA MINING SYNDICATE, LTD. *v.* SECRETARY OF STATE. **183 I.C. 839=12 R.M. 375 =48 L W. 194=1938 M.W.N. 718=A.I.R. 1938 Mad. 749=(1938) 2 M.L.J. 141.**

——S. 49—*Scope—Order by Government affixed with Government seal—Proof of—Necessity.*

Per *Cunliffe J.*—An order passed by the Government setting out the name of certain persons as having committed various offences under the Arms Act and directing, in exercise of powers conferred by S. 25, Bengal Suppression of Terrorist Outrages Act, that they should be tried by a Magistrate, invested with the power of a special Magistrate, which ends with "by order of the Governor-in-Council" and is signed by the Under-Secretary to the Government of Bengal and is also affixed with the official seal of the Government of Bengal, is not a copy but an original document within the meaning of S. 49, Government of India Act, and cannot be called into question or required to be proved according to the usual mode of proof of Government documents, which do not prove themselves, as laid down in S. 78, Evidence Act. That section has no application.

Per *Henderson, J.*—There is nothing in the terms of S. 49 that the proof of the order is dispensed with. S. 49 does not, in plain terms, empower the Court to take judicial notice of such an order. It is, however, open to the prosecution to adopt any legal mode of proof they please. Although S. 78, Evidence Act, provides a convenient mode, it is by its very terms not exhaustive. (*Cunliffe and Henderson, JJ.*) KALIJIBAN BHATTACHARJEE *v.* EMPEROR. **63 Cal. 1053=163 I.C. 41=63 C.L.J. 232=8 R.C. 714=37 Cr L.J. 775= 1936 Cr.C. 532=A.I.R. 1936 Cal. 316.**

——S. 65 (1) (e)—"*Laws*"—*Meaning.*

Section 65 (1) (*e*) cannot be construed to mean that the laws are to be general law for all purposes for all Courts and for all places and things. The laws may relate to particular individuals and need not be general legislation of provincial concern. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212 =A.I.R. 1936 Cal. 593.**

——S. 67-B (2)—*Promulgation by Governor-General of ordinance—Reasons if to be stated—Effect of promulgation—Extension of S. 7, Criminal Law Amendment Act to Madras—Effect of fresh notification by Local Government—Necessity.*

The Governor-General is the sole judge as regards the exercise of his powers under S. 67-B (2) of the Government of India Act, 1919, and he is not bound to give any reasons for promulgating an ordinance such as the Criminal Law Amendment Act of 1935, which when once promulgated becomes a lawful Act. Where the extension of S. 7 of the Criminal Law Amend-

ment Act of 1932 to the Madras Province has been duly notified, it continues to apply so long as that section is on the statute book, and there is no need for a re-notification by the Madras Government extending it to Madras. (*Leach, C. J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **I.L.R. (1939) Mad. 87=179 I.C. 605 =40 Cr.L.J. 224=11 R.M. 603=1938 M.W.N. 1105 (2)=48 L W. 813=A.I.R. 1939 Mad. 21= (1938) 2 M.L.J. 863.**

——S. 72-D (7)—"*By reason of his speech or vote*"—*Interpretation—Member asking question containing defamatory statement about another—Absolute privilege.*

The phrase "by reason of his speech or vote" includes any utterance of the vocal organs made at any time in any Legislative Council, and is not confined to the mere formal discourses which form part of debate. A member of the Burma Legislative Council asked a question under R. 8 of the Burma Legislative Council Rules and S. 4 of the Burma Legislative Council Standing Orders which was highly defamatory about another.

Held, that he was entitled to absolute privilege in respect of the question and no proceedings could be taken against him in any Court in respect of any statement made in the question. (*Roberts, C.J., Baguley and Leach, JJ.*) C. P. KHIN MAUNG *v.* AU EU WA. **14 Rang. 420=164 I.C 960=37 Cr.L.J. 1013=9 R.R 145=1936 Cr. C. 840=A I R. 1936 Rang. 425 (F.B.).**

——S. 72-D (7)—*Standing orders of Burma Legislative Council—O. 28 (3)—Member putting questions—Extent of his responsibility.*

Standing O. 28 (3) which provides that no question shall be asked, if it contains a statement by a member unless he has made himself responsible for the accuracy of the statement. It enjoins upon the member a course of conduct and means only this; that he shall give his assurance to the President if need be that he has checked the sources of his information. In one sense, he may be obliged to prove to the satisfaction of the President that the statement is accurate. He is responsible to the President and to the Council. He may also be morally responsible to those whom he is selected to represent; but the more restricted sense of legal responsibility to the Courts of law is not contemplated at all by this sub-order. (*Roberts, C.J., Baguley and Leach, JJ.*) KHIN MAUNG *v.* AU EU WA. **14 Rang. 420=37 Cr.L.J. 1013=9 R.R. 145=164 I.C. 960 =1936 Cr.C. 840=A.I.R. 1936 Rang. 425 (F.B.).**

——S. 72-D (7)—*Standing orders of Legislative Councils—Operation of.*

The Standing Orders are regulations for the procedure of the Council from within; and though they affect the rights of each member and his liability to the disciplinary sanctions which can be imposed within the Council, and to that extent may curtail freedom of speech in cases where freedom might be apt to degenerate into licence, they cannot override the Act and alter the substantive rights of members either collectively or individually in relation to the community at large. (*Roberts, C.J., Baguley and Leach, JJ.*) C. P. KHIN MAUNG *v.* AU EU WA. **14 Rang. 420=164 I.C. 960=37 Cr.L.J.**

GOVT. OF INDIA ACT (1915), S. 80-A.

1013=9 R.R. 145=1936 Cr.C. 843=A.I.R. 1936 Rang. 425 (F.B.).

——S. 80-A — *Construction — Sub-sections—Scope of—If mutually exclusive.*

The several sub-sections of S. 80-A are not to be read as mutually exclusive, but the first is controlled by the other three, and, the second controls the first, and, is in its turn controlled by the third; the third controls both the first and the second, and the fourth controls all the others. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. 167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.

——S. 80-A (1)—*'Laws'—Meaning of.*

'Laws' contemplated by S. 80-A (1) are laws of all kinds, not only laws in general or in the abstract, but rules of law in concrete cases as well. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. 167 I C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.

——S. 80-A (3)—*Interpretation of — Local legislature—Power to consider law relating to central subject—Sanction of Governor-General.*

Sub-S. (3) of S. 80-A should be interpreted as meaning that the local legislature of a province, if it makes or takes into consideration any law . . . . "(*e*) regulating a central subject," it may do so with the previous sanction of the Governor-General. The expression 'subject to the provisions of this Act' should be understood in this sense. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. 167 I C. 615=9 R.C. 726=64 C L.J. 212=A.I. R. 1936 Cal. 593.

——S. 80-A (3)—*Scope—Central subject—Legislation under S. 80 A (3).*

A declaration contemplated in Item 51 of Part 2 of the schedule of classification is not the only way in which a provincial legislature is enabled to deal with a central subject. A central subject may be legislated upon under S. 80-A (3), Government of India Act. These two again are not the only ways in which a central subject may be handled by a provincial legislature. (*Mukerji and S. K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. 167 I.C. 615=9 R.C. 726=64 C.L J. 212=A.I R. 1936 Cal. 593.

——S. 80-A (3)—*Scope and effect of—Powers of local legislature to make laws—Limits.*

It is wrong to think that sub-S. (3) of S. 80-A of the Government of India Act (1919), means that if the local legislature of a province has obtained the previous sanction of the Governor-General, it can make laws of the kind mentioned in Cls. (a) to (ii) of the sub-section so as to affect rights and properties not only within the boundaries of that province, but also outside those boundaries. The effect of sub-S. (3) is that without the previous sanction of the Governor-General, or at any rate his subsequent assent as mentioned in the proviso to the sub-section, the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction, or the subsequent assent, of the Governor-General in Council only makes such laws valid and effective within the territories of the province. (*Bennet and Verma, JJ.*) WAHID-UDDIN *v.* MAKHAN LAL. I.L.R. (1938) All. 781=1938 A.L.J. 872=1938. A.W.R (H.C.) 626=1938 R.D. 782=178 I.C. 177=11 R.A. 279=1938 A.L.R. 822=A.I.R. 1938 All. 564.

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——S. 80-A (3), (e)—*'Regulate'—Meaning of.*

The word 'regulate' in Cl. (*e*) of S. 80-A (3) does not mean 'adjust' but means to control by legislation, to subject to guidance by creating a law. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. 167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.

——S. 96-B—*Assistant Income-tax Officer—Dismissal by Commissioner of Income-tax—If illegal—Commissioner—If person subordinate to the appointing authority.*

The Commissioner of Income-tax is the proper person to dismiss an Income-tax Officer or an Assistant Income-tax Officer. The Commissioner is not a person subordinate to the appointing authority within the meaning of S. 96-B of the Government of India Act. The Commissioner is himself the appointing authority though his powers in that connection may be interfered with by a higher authority on various grounds. (*Varadachariar and Pandrang Row, JJ.*) NILAMEGHAM PILLAI *v.* SECRETARY OF STATE. 172 I.C. 244=10 R.M. 439=46 L. W. 242=A.I.R. 1937 Mad. 777.

——S. 96-B—*Civil Services Rules, R. 55—(Classification, Control and Appeal)—Assistant in Secretariat removed from service without his witnesses being examined—Dismissal, if wrongful.*

An Assistant in the Office of Home and Political and Judicial Department lost some official files and papers on his way home from the office. The Chief Secretary disbelieved his story and removed him from appointment for gross negligence without having heard his witnesses and took into consideration adverse reports and the fact that he was an insolvent, without calling for any explanation from him.

Held, that the removal being contrary to the provisions of R. 55 was wrongful and hence entitled the servant to damages. A.I.R. 1934 Rang. 381, Rel. on. (*Leach, J.*) MAURICE *v.* SECRETARY OF STATE. 166 I. C. 558=9 R. R. 266 (2)=A.I.R. 1936 Rang. 478.

——S. 96-B—*Civil Services (Classification, Control and Appeal) Rules, R. 55—Inquiry under—Power to hold—Authority competent to impose punishment—If can delegate inquiry to subordinate officer.*

R. 55 of the Civil Services (Classification, Control and Appeal) Rules, which provides for the case of a departmental inquiry into charges against a Government servant who is subject to the rule, contains a safeguard to the effect that none of the graver penalties—dismissal, removal or reduction—which the authority concerned is empowered to inflict can be imposed upon the person charged unless he has been given an adequate opportunity of defending himself. But the rule does not state that the authority concerned shall itself hold the inquiry. The authority is competent under the rule to depute some subordinate officer to hold the inquity. The purpose of the rule is to enable a Government servant to defend himself when his conduct is the subject of a charge which is to be departmentally inves-

tigated. And so long as the conditions of the rule are followed, there is nothing prejudicial to the Government servant in the circumstance that the inquiry is held not by the authority itself which imposes the punishment but by some subordinate officer deputed by that authority for the purpose. (*Beasley, C.J. and Cornish, J.*) RAJAGOPALA AIYANGAR *v.* COLLECTOR OF SALT REVENUE, MADRAS. I.L.R. (1938) Mad. 127=173 I.C. 251 =10 R.M. 536 (2)=1937 M.W.N. 821=46 L.W 531=A.I.R. 1937 Mad. 735=(1937) 2 M.L.J. 189.

——S. 96-B—*Civil Services Rules, R.* 55—*Wrongful removal—Assessment of damages.*

In assessing damages for wrongful dismissal the dismissed servant is not entitled to a sum based on what he would have received by way of salary and pension if he had been allowed to remain in Government service till the age of retirement. The likelihood of his obtaining other employment together with the facts which were proved against him in the course of the inquiry and the right which the Crown had to dispense with his service at will should be taken into account. Damages for wrongful dismissal cannot include compensation for the manner of dismissal or for injured feelings or for the loss which the dismissed servant may sustain from the fact that dismissal itself makes it more difficult for him to obtain fresh employment. (*Leach, J.*) MAURICE *v.* SECRETARY OF STATE. 166 I.C. 558=9 R.R. 266 (2)=A.I.R. 1936 Rang. 478.

——S. 96-B—*Classification Rules, R.* 55—*Dismissal of civil servant—Inquiry not following procedure in R.* 55—*Cause of action.*

The word "subject to the provisions of this Act and of Rules made thereunder" in S. 96-B must be held to govern the whole section, and thus the rules made under the section limit the power of the Crown to dismiss at pleasure. A civil servant would, therefore, have a cause of action against the Secretary of State for India in Council if the inquiry leading to his dismissal had not followed the procedure laid down in R. 55 of the Classification Rules. Where a charge was framed against him and he was called on to put in a written statement of his defence but he was not called upon to state whether he desired to be heard in person, though in his covering letter with reference to his explanation he distinctly stated that he could prove whatever he had stated, there was a failure to comply with the provisions of R. 55 and to that extent, the dismissal of the civil servant was wrongful and he had a cause of action which could be tried in the Civil Court. (*Bhide and Currie, JJ.*) GIRDHARI LAL *v.* SECRETARY OF STATE. 159 I C. 1107=8 R.L. 473=39 P.L.R. 514=A.I.R. 1937 Lah. 226.

——S. 96-B—*Effect of—Right to enforce rules made thereunder.*

Although by virtue of S. 96-B, a statutory right is created between the Crown and the servant, it is not to be implied that any provisions in Statute 23 of 1871, repugnant to the terms of the Statute creating such right are repealed or rendered inapplicable to such a case. Statute of 1919 does not confer right of action to enforce the rules made thereunder. (*Lord Roche.*) RANGACHARI *v.* SECRETARY OF STATE. 64 I. A. 40=I L.R. (1937) Mad. 517=65 C.L.J. 211=39 Bom.L.R. 688=

1937 A L.R. 96=166 I.C. 513=18 Pat.L.T. 139= 1937 A.L.J 220=9 R.P.C. 153=41 C.W.N. 545 =1937 P.W.N. 161=1937 O.L.R. 53=3 B.R. 266=1937 A.W.R. 126=45 L.W. 139=1937 O. W.N. 109=1937 M.W.N. 100=A.I.R. 1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.).

——S. 96-B—*Fundamental Rules framed under —Power of Crown to dismiss civil servants at pleasure—Dismissal in violation of rules—Right of redress in Civil Court.*

It is a fundamental principle, based on public policy, that the Crown should have the unfettered discretion to remove a public servant at pleasure, and even a contract to engage him for a fixed term, if there be no statute law authorising it, would not be available to him, such a contract being void as against public policy. This power to dismiss at will can only be controlled by a statute but cannot be abridged or controlled by rules or regulations of service, even if those rules or regulations are framed under powers given by a statute. Consequently, the dismissal or discharge of a civil servant in violation of the Fundamental Rules framed under S. 96-B of the Government of India Act, 1919, would not entitle him to an appeal to the Civil Court but would leave him to appeal only to the administrative authorities. (*Mitter and Sen, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SURENDRA NATH. I L.R. (1939) 1 Cal. 46=180 I.C. 918=11 R.C. 758=42 C.W. N. 1186=68 C.L.J. 320=A.I.R. 1938 Cal. 759.

——S. 96-B—*Fundamental Rules, Part III, R. 54—Re-instatement—Civil servant placed on suspension and then discharged with payment of one month's pay in lieu of notice—Such payment, if amounts to re-instatement.*

Where a civil servant was placed on suspension till a criminal case against him was finally decided and on his conviction by the Magistrate was dismissed from service but on his acquittal in appeal, the order of dismissal was cancelled and he was discharged from service, a month's pay being given in lieu of notice, the said payment does not amount to re-instatement and he cannot, therefore, under R. 54, Part. III of the Fundamental Rules, claim full pay for the whole period of suspension. (*Mitter and Sen, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SURENDRA NATH. I.L.R. (1939) 1 Cal. 46=180 I.C. 918=11 R.C. 758=42 C.W.N. 1186=68 C.L.J. 320=A.I.R. 1938 Cal. 759.

——S. 96-B—*Government servant granted invalid pension by competent authority—Right of successor to remove him from office.*

In a case in which after Government officials, duly competent and duly authorised in that behalf, have arrived honestly at one decision, their successors in office after the decision has been acted upon and is in effective operation, cannot purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. Where a Sub-Inspector of Police was granted an invalid pension by a competent authority and thus duly ceased to be in service, and the officer succeeding the authority, which had granted the pension, reconsidered the matter and ordered his removal from the service.

Held, that the servant had suffered a wrong and therefore had every right to complain of the stoppage of pension as a breach of rules relating to pensions. (*Lord Roche.*) RANGACHARI *v.*

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SECRETARY OF STATE. 64 I.A. 40=I.L.R. (1937) Mad. 517=18 Pat.L.T. 139=65 C.L.J. 211=39 Bom.L.R. 688=1937 A.L.R. 96=1937 A.L.J. 220=9 R.P.C. 153=41 C.W.N. 545=1937 P.W.N. 161=1937 O.L.R. 53=3 B.R. 266=166 I.C. 513=1937 A.W.R. 126=45 L.W. 139=1937 O.W.N. 109=1937 M.W.N. 100=A.I.R. 1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.).

——S. 96-B—*Proviso as to dismissal—Force of.*

The stipulation or proviso as to dismissal in S. 96-B is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. This statutory safeguard should be observed with the utmost care and a deprivation of pension based upon a dismissal purporting to be made by an official, who is prohibited by statute from making it, rests upon an illegal and improper foundation. (*Lord Roche.*) RANGACHARI *v.* SECRETARY OF STATE. 64 I A. 40=I.L.R. (1937) Mad. 517=65 C.L.J. 211=39 Bom.L.R. 688=1937 A.L.R. 96=18 Pat.L.T. 139=1937 A.L.J. 220=9 R.P.C. 153=41 C.W.N. 545=1937 P.W.N. 161=1937 O.L.R. 53=3 B.R. 266=166 I.C. 513=1937 A W.R. 126=45 L.W. 139=1937 O.W.N. 109=1937 M.W.N. 100=A.I.R. 1937 P.C. 27=(1937) 1 M.L.J. 515 (P.C.).

——S. 96-B—*Right of Crown in India to dismiss its servant.*

The right of the Crown in India to dismiss its servant is absolute unless there is some provision in the Act or of the rules made thereunder, which limits it. There is nothing in the Act itself which limits the right, but rules have been made under the powers conferred by the Act, and certain formalities have to be complied with before the Crown can lawfully remove a person from its service in India. A.I.R. 1934 Rang. 381; A.I.R. 1936 Bom. 19 and A.I.R. 1936 Rang. 207, Rel. on. (*Leach, J.*) MAURICE *v.* SECRETARY OF STATE. 166 I.C. 558=9 R.R. 266 (2)=A.I.R. 1936 Rang. 478.

——S. 96-B—*Rules made under—Suit by civil servant for wrongful dismissal against Secretary of State—Maintainability.*

There is, as a matter of construction, nothing in S. 96-B, Government of India Act, 1919, to relax the overriding pleasure of the Crown which, on the contrary it expressly re-affirms—to dismiss its servants and there is no inconsistency between the rules made thereunder and the benefit they afford a servant of the Crown on the one hand and His Majesty's overriding right to dismiss his servants at will on the other hand. To put the matter quite shortly, the rules made under that section appear to be regulations, devised for the benefit of the civil servant but to which he has no contractual privity, prescribing merely the machinery by which the pleasure of the Crown, is as between itself and the Local Government, to be exercised. S. 96-B and the rules made thereunder do not therefore confer upon a civil servant in India the right hitherto not possessed by him of bringing an action in the Courts for wrongful dismissal. 8 Rang. 215 and 12 Rang. 556, Overr.; A.I.R. 1936 Rang. 478 Rev.; A.I.R. 1937 P.C. 31, Foll. (*Roberts, C.J., Dunkley and Braund, JJ.*) SECRETARY OF

OVT. OF INDIA ACT (1915), S. 96-B.

STATE *v.* MAURICE. 1937 Rang.L.R. 35=168 I.C. 272=9 R.R. 348=A.I.R. 1937 Rang. 89 (S.B.).

——S. 96-B—*Servant of Crown—Dismissal—Right to sue for damages for wrongful dismissal—Refusal by Crown to employ person accepting offer of employment—Actionability—Contract to the contrary—Effect of.*

A servant of the Crown in India holds his appointment at the pleasure of the Crown and is liable to dismissal at the will and pleasure of the Crown, notwithstanding a contract to the contrary, unless the Crown has deprived itself of its prerogative in some way expressly recognised by law, nor can an action for wrongful dismissal be entertained even though a special contract be proved. A refusal to employ a person to whom employment has been offered does not stand on a different footing, because the power to dismiss an employee at pleasure involves the power to refuse to employ a person accepting an offer of employment. (*Broomfield and Wassoodew, JJ.*) KRISHNAJI NILKANT *v.* SECRETARY OF STATE. 172 I.C. 451=10 R.B. 279=39 Bom.L.R. 807=A.I.R. 1937 Bom. 449.

——S. 96-B—*Servants of Crown—Right of action.*

The words 'subject to the rules' appearing in S. 96-B, of Government of India Act, are not superfluous and ineffective. The section contains a statutory and solemn assurance that the tenure of office held by servants of the Crown though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. Redress therefore in such cases is not obtainable from the Courts by action. It is so even where there has been serious and complete failure to adhere to important and fundamental rules, as for instance in the case of a person who has been dismissed from service without any investigation into the charge as per R. 14 under S. 96-B. The remedy of the person aggrieved does not lie by a suit in Court but by way of appeal of official kind. (*Lord Roche.*) VENKATA RAO *v.* SECRETARY OF STATE. 64 I.A. 55=I.L R. (1937) Mad. 532=65 C.L.J. 231=39 Bom.L.R. 699=1937 A.L.R. 91=18 Pat.L.T. 132=1937 A L.J. 213=9 R.P.C. 148 (2)=41 C.W.N. 554=1937 P.W.N. 150=1937 O.L.R. 49=3 B.R. 241=166 I.C. 516=1937 A.W.R. 132=45 L.W. 146=1937 O.W.N. 116=1937 M.W.N. 103=A.I.R. 1937 P.C. 31=(1937) 1 M.L.J. 529 (P.C.).

——Ss. 96-B, 32 (2) and 131—*Wrongful dismissal of civil servant—Suit for damages against Secretary of State—Maintainability—Civil Services (Classification, Control and Appeal) Rules—Breach of—Proper remedy.*

S. 96-B of the Government of India Act, 1919, lays down in express terms that every person in the Civil Service of the Crown holds office during His Majesty's pleasure. This statutory prerogative of the Crown cannot be taken away by any rules made by the Secretary of State. The rules made by him under S. 96-B of the Act, *viz.*, the Civil Services (Classification, Control and Appeal) Rules, are merely rules for the guidance of officers of the Government of India and of Local Governments in the conduct of official or departmental inquiries against officers found to be at fault in the discharge of their

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duties. They can be altered from time to time by the Secretary of State for India whenever he thinks fit to do so. They cannot, therefore, be said to be part of the contract between the public servant and the Crown. The remedy for any breach of these rules lies in an appeal by the aggrieved public servant to the immediate official superior of the officer who has passed the alleged illegal order of dismissal or removal, but it can furnish no cause of action for damages against the Crown or the Secretary of State, who in this matter represents the Crown. 54 Cal. 44, 12 Rang. 556 and 159 I.C. 1107, Diss. From. (*Nanavutty and Smith, JJ.*) KANHAIYA LAL *v.* SECRETARY OF STATE. **12 Luck. 657=165 I.C. 834=9 R.O. 242=1936 O.L.R. 681=1936 O.W.N. 1140=A.I.R. 1937 Oudh 209.**

——**S. 96-B**—*Wrongful dismissal of civil servant—Suit for damages—Court, if can consider grounds of dismissal.*

In assessing damages in a case where it is not the dismissal itself of the civil servant which is wrongful but the manner of the enquiry leading to the dismissal the Court is compelled to consider whether there were good grounds for the actual dismissal. (*Bhide and Currie, JJ.*) GIRDHARI LAL *v.* SECRETARY OF STATE. **159 I C. 1107=8 R.L. 473=39 P.L.R. 514=A.I.R. 1937 Lah. 226.**

——**S. 96-B**—*Servants of Crown—Illegal dismissal—Cause of action—Mere declaration by Civil Court—If justified.*

A servant of the Crown who is dismissed from service has no cause of action against the Crown, although the dismissal is by an authority subordinate to the one who appointed him and is, therefore, made in contravention of the very terms of the Government of India Act. A mere declaration by the Civil Court that the dismissal is illegal and that the servant is fit to be reinstated to his post will not serve any useful purpose. Because he was illegally dismissed, it does not necessarily follow that he was a good officer or that he might not have been legally dismissed and justifiably dismissed on proper grounds and after a proper enquiry. (*Henderson, J.*) PROVINCE OF BENGAL *v.* BHUPENDRA KUMAR ROY. **44 C.W.N. 79=71 C.L.J. 95.**

——**Ss. 106 and 80-A (4)**—*Jurisdiction of High Court—Curtailment of—Powers of Provincial Legislature.*

The jurisdiction, powers and authority of the High Court as conferred by S. 106 of the Government of India Act, 1915—1919, can be affected either by His Majesty by further Letters Patent or by the Indian Legislature. The Provincial Legislature even with previous sanction of the Governor-General cannot by reason of S. 80-A (4) of the Act affect, curtail or extend the jurisdiction and powers of the High Court, and if it passes such a piece of legislation, it would be *ultra vires*. (*Derbyshire, C. J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) NARSINGHDAS TANSUKDAS *v.* CHOGEMULL. **I L R (1939) 2 Cal. 93=183 I.C. 113=12 R.C. 129=2 Fed.L.J. (P. II) 71=69 C.L.J. 458=43 C.W.N. 613=A.I.R. 1939 Cal. 435 (S.B.).**

——**S. 106 (2)**—*Construction and scope—Failure to pay income-tax—Order for arrest—Jurisdiction of High Court to issue writ of* certiorari.

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Income-tax is revenue and proceedings taken or acts done in the collection thereof cannot be questioned in the High Court in view of S. 106 (2) of the Government of India Act and an application for a writ of *certiorari* is therefore unsustainable. (*Venkataramana Rao, J.*) THYAGARAJA CHETTIAR *v.* COLLECTOR OF MADURA. **59 Mad. 702=163 I.C. 60=8 R.M. 1080=1936 M. W.N 55=43 L.W. 396=A.I.R. 1936 Mad. 398=70 M.L.J. 343.**

——**S. 106 (2)**—*Construction—"Matter concerning the revenue"—Meaning of—Stamp duty payable in document—Question as to—Jurisdiction of High Court to entertain suit.*

The expression ' the revenue" in S. 106 (2) of the Government of India Act does apply to the stamp duty payable under the Indian Stamp Act and such stamp duty does fall within the terms of the section. Where the contention is that the stamp authorities are not entitled to charge any particular stamp duty, it must be a "Matter concerning the revenue" within the meaning of S. 106 (2), and any act ordered to be done in the collection of the revenue would likewise be a matter concerning the revenue. An act done by the revenue authorities for the purpose of collecting the revenue which they consider to be properly leviable in accordance with law is an act done in accordance with law and can never give rise to any cause of action against the officers of the Secretary of State. The High Court has no jurisdiction to entertain a suit in such a matter by reason of the bar imposed by S. 106 (2), and the public have no remedy against what may turn out to be a wrong and arbitrary decision of the stamp authorities with regard to the payment of duty chargeable in respect of any particular document, save and except the somewhat doubtful remedy provided by S. 56 of the Stamp Act. (*Rangnekar, J.*) DEWARKHAND CEMENT CO., LTD. *v.* SECRETARY OF STATE. **I.L.R. (1939) Bom. 320 =182 I.C. 835=12 R.B. 37=2 Fed.L.J. (P. II) 60=41 Bom.L R. 297=A.I.R. 1939 Bom. 215.**

——**S. 106 (2)**—*Construction—Matter concerning revenue—Assessment of duty by customs under Sea Customs Act.*

A bill of entry relating to a consignment of goods did not declare certain goods and also wrongly described certain other goods. The Customs Authorities reassessed them for duty by the addition of 50 per cent. on each item of the value declared and also imposed a penalty. The letter to the importer stated that "the duty short-levied must be paid." The final order of the Collector of customs referred to the penalty and also to the "payment of correct duty assessed under S. 87 of the Sea Customs Act." The importer applied to the High Court under S. 45 of the Specific Relief Act for an order upon the Customs Authorities to proceed under S. 32 of the Sea Customs Act.

Held, that what was done by the Customs Authorities was not outside "revenue" or collection of revenue and that to interfere in the matter would be to exercise jurisdiction in a matter concerning revenue. (*Ameer Ali, J.*) WAN TEN LANG *v.* COLLECTOR OF CUSTOMS. **I.L.R. (1939) 2 Cal. 541=189 I.C. 556=13 R.C. 77=A.I.R. 1940 Cal. 174.**

GOVT. OF INDIA ACT (1915), S. 106.

——S. 106 (2)—*"Have not and may not exercise any original jurisdiction"—Meaning and effect of.*

The expression "original jurisdiction" in S. 106 (2), Government of India Act, need not be confined to ordinary original civil jurisdiction. The words "have not" and "may not" in the section are declaratory and prospective and would aptly comprise also the jurisdiction vested in the Court at the commencement of the Act, apart from the jurisdiction vested by the Letters Patent. (*Venkataramana Rao, J.*) THYAGARAJA CHETTIAR *v.* COLLECTOR OF MADURA. 59 Mad. 702 =163 I.C. 60=8 R.M. 1080=1936 M.W.N. 55= 43 L.W. 396=A.I.R. 1936 Mad. 398=70 M.L.J. 343.

——S. 106 (2)—*Scope—"Any matter concerning the revenue"—Payment of higher customs duty under protest—Appeal to Central Board of Revenue—Dismissal—Suit on Original Side of High Court to declare levy illegal and for refund —Maintainability—Jurisdiction of High Court—Sea Customs Act, Ss.* 188 *and* 191.

After the arrival of certain shipments of goods and after the importer had presented bills of entry and accepted the valuation fixed by the Customs Authorities, the duty on the goods was increased, and consequently a higher amount of duty was demanded by the Customs Authorities from the importer than would have been payable prior to that date. The importer paid the increased amount of duty under protest, claiming that he was liable only to pay the lower duty in view of the delay which occurred in the matter of valuation of the goods, and then appealed to the Central Board of Revenue under S. 188 of the Sea Customs Act. The Board dismissed the appeal. The importer then filed a suit on the Original Side of the High Court against the Secretary of State represented by the Collector of Sea Customs, for a declaration that the order of the Central Board of Revenue was contrary to law, *ultra vires* and against the Sea Customs Act, and for refund of the excess duty.

Held, (1) that the matter was entirely one of revenue and that the suit was therefore barred under S. 106 (2) of the Government of India Act, (2) that the suit was also barred under Ss. 188 and 191 of the Sea Customs Act, the remedy given by the Act under Ss. 188 and 191 amounted to an ouster of the jurisdiction of the Courts. The Act itself provided, the remedy and the tribunal to decide disputes under the Act. (*Gentle, J.*) BHIWANDIWALLA & CO. *v.* SECRETARY OF STATE. 172 I.C. 70=10 R.M. 429=45 L.W. 394=A.I.R. 1937 Mad. 536.

——S. 107—*Appellate order of Collector under Regulation I of* 1912—*Revision by High Court—Competency — Jurisdiction of High Court—If taken away by new Government of India Act—Proceedings commenced before new Act—Effect of.*

The Collector exercising original jurisdiction under S. 26 of Regulation I of 1912 is not different tribunal from the Collector exercising appellate jurisdiction. The Collector is a judicial tribunal under the Regulation and is subject to the appellate jurisdiction of the High Court under S. 107 of the Government of India Act of 1919. An appellate order of the Collector is therefore revisable by the High Court under S. 107 of the Government of India Act. The fact that S. 107 has been repealed by the new Act of 1935 is no bar to the revision application, when it arises in proceedings initiated before the new Act. The effect of the repeal is not to destroy or take away the jurisdiction, which existed at the time when proceedings were initiated. (*Pandrang Row, J.*) ABDULLA *v.* THANGA KOYA. 182 I.C. 608=12 R. M. 114=1938 M.W.N. 804=A.I.R. 1938 Mad. 855=(1938) 2 M.L.J. 447.

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——S. 107—Collector's order refusing to make reference to Court under S. 18, Land Acquisition Act—Revision—Jurisdiction of High Court. *See* LAND ACQUISITION ACT, S. 18. A.I.R. 1937 Nag. 12.

——S. 107—High Court's powers under—When to be exercised—Obvious case of wrong or illegal conviction—Applicant failing to appeal—Application in revision not entertainable—Power to interfere. *See* CR. P. CODE, S. 439 (5). 39 Bom. L.R. 82=A.I.R. 1937 Bom. 153.

——S. 107—Order declining to re-issue interrogatories—Revision. *See* C. P. CODE, O. 11, R. 1. A.I.R. 1937 Lah. 28.

——S. 107—*Petition under*—Locus standi *of Bar Association to present—Inquiry under S.* 36, *Legal Practitioners' Act.*

In an inquiry under S. 36 (1), Legal Practitioners' Act, the District Judge found that the persons against whom the inquiry was instituted were not touts. The District Bar Association on whose resolution the inquiry was started made a petition to the High Court against the order of the District Judge. An objection was raised on behalf of the respondents that the Association had no right to present the application.

Held, that under S. 107, Government of India Act, it was open to the High Court to take cognizance of the proceedings on information supplied by any person.

Held, further, that though the Association was not entitled to appear before the High Court as of right it was within the power of the High Court to allow the Association to place the proper material before the High Court to enable it to do justice. (*Jai Lal, J.*) DISTRICT BAR ASSOCIATION, HOSHIARPUR *v.* RAM SINGH. 165 I.C. 963=9 R.L. 323=1936 Cr.C. 377=39 P.L.R. 62=38 Cr.L.J. 19=A.I.R. 1936 Lah. 382.

——S. 107—*Powers of High Court.*

In rare causes, in order to do substantial justice between the parties, the High Court while exercising its powers of superintendence under S. 107, Government of India Act, can interfere in matters which are not merely administrative but judicial. A.I.R. 1933 Lah. 259, Foll. (*Agha Haidar, J.*) PREMAN SHAH *v.* BENARSI DAS. 161 I.C. 645=38 P.L.R. 438=8 R.L. 777=A.I.R. 1936 Lah. 141.

——S. 107—*Revision — Decree of Munsiff's Court in Agency tract—Revision to High Court—Competency—Letters Patent (Madras), Cl.* 16—*Agency Rules.*

The High Court has jurisdiction to entertain a revision petition under S. 107 of the Government of India Act and Cl. 16 of the Letters Patent against a decree passed by a District Munsiff's Court in an Agency tract. There is nothing in the Agency Rules inconsistent with the powers of superintendence possessed by the High Court. A District Munsiff's Court in an Agency tract is a

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Civil Court subject to the appellate jurisdiction of the High Court. (*Pandrang Row, Wadsworth and Venkataramana Rao, JJ.*) VENKU NAIDU *v.* MAHADEVU SANYASI. **59 Mad. 356=161 I.C. 310 =8 R.M. 816=43 L.W. 237=1936 M.W.N. 81= =A.I.R. 1936 Mad. 187=70 M.L.J. 204 (F.B.).**

——**S. 107**—*Scope—Powers of High Court under—Sentence under Bengal Suppression of Terrorist Outrages Act—Revision by High Court —Competency—Act XXIV of* 1932.

The High Court has no power under S. 107 of the Government of India Act to interfere with and revise and thereby reduce or modify a legal sentence passed by a special Magistrate under the Bengal Suppression of Terrorist Outrages Act of 1932. S. 5 of the Bengal Suppression of Terrorist Outrages (Supplementary) Act (XXIV of 1932) bars any appeal or revision from such a sentence. (*Cunliffe and Henderson, JJ.*) MADAN MOHAN ROY *v.* EMPEROR. **63 Cal. 1086=164 I.C. 798=37 Cr.L.J. 1025=9 R.C. 282=40 C.W. N. 735.**

——**S. 107**—Scope and effect— Bihar Money-Lenders' Act, S. 16—If void as repugnant to O. 21, R.66, C. P. Code (Patna amendment). *See* BIHAR MONEY-LENDERS' ACT, S. 16. **19 Pat.L.T. 760.**

——**S. 108**—*Scope—If takes away jurisdiction of single Judge of High Court to issue writ of* habeas corpus—*Madras High Court Rules (Appellate Side), R.* 2 (a)—*If* ultra vires.

The jurisdiction and the duty as regards applications for a writ of *habeas corpus* are *sui generis* and do not fall within the framework of S. 108 of the Government of India Act or any rule framed thereunder. The individual jurisdiction and the individual duty of each Judge in this matter are not affected by any statutory provision or rule. Rule 2 (*a*) of the Madras High Court Appellate Side Rules is therefore *ultra vires*, as its effect is to take away the individual jurisdiction which each Judge has in this matter and to prevent the performance of his legal duty to determine on the merits any application for issue of a writ of *habeas corpus* made to him. (*Pandrang Row, J.*) CROWN PROSECUTOR, MADRAS *v.* MAMMEN MAPPILLAI. **179 I.C. 917=11 R.M. 634=40 Cr.L.J. 297=1938 M.W.N. 1161=A.I. R. 1939 Mad. 115=(1939) 2 M.L.J. 135 (N.).**

——**S. 108 (1)**—*High Court Rules relating to constitution of Benches— Amendment pending appeal—Retrospective operation.*

Where the valuation of an appeal was Rs. 1,200 and at the time when it was filed it was cognizable by two judges under the rules made by the High Court under S. 108 (1) of the Government of India Act, but subsequently by amendment of the rules the pecuniary jurisdiction of a single Judge had been raised up to Rs. 2,000.

Held, that the rules of the High Court were exclusively for regulating the procedure in that Court as regards the constitution of Benches and that the appellant had no vested right in such a constitution, and that if by an amendment of the rules the constitution of the Benches was altered the appeal still lay to the High Court, and the appellant could not claim that the appeal must be heard by a Bench as constituted before the rule was amended, and that the appeal was, therefore, cognizable by a single Judge of the High Court. (*Sulaiman, C.J. and Allsop, J.*)

GOVT. OF INDIA ACT (1935), S. 49.

HAR PRASAD *v.* BOOL CHAND. **I.L.R. (1937) All. 191=166 I. C. 615 (1)=9 R.A. 426 (1)=1937 A. L.R. 63=1936 A.W.R. 975 (1)=1936 A.L.J. 1046 =A.I.R. 1937 All. 19.**

——(1935)—*Interpretation of — Principles— Duty of Court.*

The constitution is not to be construed in any narrow or pedantic sense, and the Court will have regard to the fact that the subject-matter of the interpretation is a constitution—a mechanism under which laws are to be made and not a mere Act which declares what the law shall be. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938, *In the matter of* **I.L.R. (1939) Kar. (F.C.) 6=1939 F.C.R. 18=180 I.C. 161=11 R.F.C. 1=2 F.L.J. 6=20 Pat.L.T. 197= 1939 O.L.R. 144=5 B.R. 405 (2)=43 C.W.N. (F.C.R.) 1=1939 P.W.N. 453=49 L.W. 36=1939 M.W.N. 25=A.I.R. 1939 F.C. 1=(1939) 1 M. L.J. (Supp.) 1.**

——*Interpretation of—White paper and Report of Joint Select Committee—Prior Legislative Practice—Reference to—If justified.*

Gwyer, C.J. and Jayakar, J. (*Sulaiman, J., doubting.*)—The proposals for Indian Constitutional Reforms known as the White paper and Report of the Joint Select Committee thereon are historical facts and their relation to the constitution Act is a matter of common knowledge to which the Court is entitled to refer.

Gwyer, C.J. and Sulaiman, J. (*Jayakar, J., doubting.*)—The Legislative practice in India preceding the constitution Act may be looked into, for Parliament must surely be presumed to have that in mind, and unless the context otherwise clearly requires not to have conferred a legislative power in a sense not understood by those to whom the Act was to apply. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938. *In the matter of.* **I L.R. (1939) Kar. (F.C.) 6=1939 F.C.R 18=180 I.C. 161=11 R.F C. 1=2 F.L.J. 6 =20 Pat.L.T. 197=1939 O.L.R. 144=5 B R. 405 (2)=43 C.W.N. (F.C.R.) 1=1939 P.W.N. 453= 49 L.W. 36=1939 M.W.N. 25=A.I.R. 1939 (F.C.) 1=(1939) 1 M.L.J. (Supp.) 1.**

——**S. 45-A**— *Devolution rules — Scope and effect.*

Per *Lort Williams, J.*—S. 45-A of the Government of India Act does not declare that the devolution rules made under it are part of the Act. If any of them are inconsistent with the sections, the latter must prevail.

Per *Mitter, J.*—As the devolution rules framed under S. 45-A of the Government of India Act have to be made under the procedure prescribed in S 129-A, they become part of the statute. If they and the statute are in conflict, the governing intention of the Legislature must *prima facie* be taken to be that expressed in the statute and not in the rules framed under it, and the latter will have to be rejected on the ground of repugnancy. (*Derbyshire, C.J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) NARASINGHDAS *v.* TANSUKDAS *v.* CHOGEMULL. **I.L.R (1939) 2 Cal. 93=183 I.C. 113=12 R.C. 129=2 F.L.J. (P. II) 71=69 C. L.J. 458=43 C.W.N. 613=A.I.R. 1939 Cal. 435 (S.B.).**

——**S. 49**—*Ministers—If subordinate officers to Governor.*

GOVT. OF INDIA ACT (1935), S. 49.

The ministers of a province are not subordinate officers to the Governor within the meaning of S. 49 of the Government of India Act. (*Derbyshire, C.J., Nasim Ali and Rau, JJ.*) EMPEROR *v.* HEMENDRA PROSAD. I.L.R. (1939) 2 Cal. 411=183 I.C. 349=12 R.C. 153=2 F L.J. (P. II) 55=40 Cr.L.J. 782=69 C.L J. 599=43 C.W.N. 950=A.I.R. 1939 Cal. 529 (S.B.).

——Ss. 49, 50, 53 and 59—*Prosecution for sedition—Sanction under S. 196, Cr. P. Code—Powers of Governor—Duty to consult Ministers before according sanction—Failure to consult—Legality—If can be challenged in Court of law.*

There is nothing in the Government of India Act of 1935 which imposes a legal obligation upon the Governor of a Province to consult his ministers before sanctioning under S. 196, Cr. P. Code, a prosecution for an offence under S. 124-A, I. P. Code. There is no provision in the Act which requires the Governor to consult his ministers before performing executive acts. The instrument of instructions implies that he should consult his ministers, but he is not legally required to do so. In the case of a sanction for prosecution under S. 196, Cr. P. Code, the Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his action can be called in question in a Court of law. (*Horwill, J.*) BATLIWALA *v.* EMPEROR. 1938 M.W.N. 529=48 L.W. 170=177 I.C. 747=39 Cr.L.J. 938=A.I.R. 1938 Mad. 758=(1938) 2 M.L.J. 416.

——S. 49—Scope and effect of—Order under S. 36, Madras District Municipalities Act—Power of Governor to issue—Governor and Provincial Government—Differentiation. *See* GOVERNMENT OF INDIA ACT, S. 306. 50 L.W. 538.

——Ss. 100 and 107—*Scope and effect of—Madras Agriculturists' Relief Act—If* ultra vires *the powers of the Provincial Legislature as repugnant to Negotiable Instruments Act, Usurious Loans Act or the Hindu Law of debts—Assent of Governor-General—Effect of.*

Though in one aspect and for one purpose a subject may be within the powers of the Federal Parliament, in another aspect and for another purpose it may fall within the powers of a Provincial Legislature. The Madras Agriculturists' Relief Act is one which relates to "*agriculture*" a subject reserved for the Provincial Legislature, item 20 of List II of Schedule VII of the Government of India Act. The Act relates to money-lending to agriculturists, and "*money-lending*" also is a subject reserved for Provincial Legislature, item 27 of List II of Sch. VII. The only effect of the Act, so far as Negotiable Instruments are concerned is to reduce liability where the maker or endorser is an agriculturist. The Act being in substance within the powers of the Madras Legislature, the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. So too its affecting discretion given to Courts by the Usurious Loans Act cannot affect its validity. Even if the matters dealt with under the Act do not come within the exclusive powers of the Provincial Legislature, the Act can be supported on the ground that it relates to "contracts" falling within the concurrent legislative list, item 10 of List III, Sch. VII of the Government of India Act, and the Act having been reserved for consideration of the Governor-General and received his assent under S. 107 of the Government of India Act, its provisions must prevail in the province unless and until the Federal Legislature thinks fit to legislate in respect of the same matter. The Provincial Legislature has power to legislate with regard to "contract" and no exception is made in regard to contracts entered into by Hindus. There is no "Federal" or "existing Indian law" which stands in the way, and even if there were, the sanction of the Governor-General under S. 107 (2) of the Government of India Act would remove it. The manager of a joint Hindu family is in the position of an agent and the Provincial Legislature has power to legislate, under the concurrent Legislative List, with regard to contracts. The Madras Agriculturists' Relief Act is therefore *intra vires* the powers of the Provincial Legislature, and not *ultra vires* on the ground that its provisions are repugnant to the provisions of the Negotiable Instruments Act, the Usurious Loans Act and the Hindu Law as to debts. (*Leach, C.J., Wadsworth and Krishnaswami Ayyangar, JJ.*) NAGARATNAM *v.* SESHAYYA (THE MADRAS AGRICULTURISTS' ACT, *In re.*) I.L.R. (1939) Mad. 151=180 I.C. 994=11 R.M. 760=2 F.L.J. 39=1939 M.W.N. 192 (2)=49 L.W. 257=A.I.R. 1939 Mad. 361=(1939) 1 M.L.J. 272 (F.B.)

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——S. 100 and Sch. VII, List 1, item 19 and List II, item 31—*Powers of Provincial Legislature to legislate as to possession of liquor—Prohibition of possession—Legality.*

Obiter.—A right to legislate as to possession of intoxicating liquors must necessarily involve a right to prohibit possession. The Provincial Legislature has power so to limit possession, provided that in so doing it does not encroach upon the legislative powers of the Central Governments. The Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea frontier of Bombay, under item 19 of List I of the 7th schedule, and the powers of the Provincial Legislature under item 31 in list II of the 7th schedule to the Government of India Act, 1935, must be exercised subject to this right of the Central Legislature. The Provincial Legislature has therefore no power to legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontiers. The power of the Provincial Government to legislate as to possession is thus a qualified, and not an absolute power, it is subject to the rights of the Central Government. (*Beaumont, C.J., Wadia, Wassoodew and Sen, JJ.*) EMPEROR *v.* SAVER MANUEL DANTES 42 Bom. L. R. 791=A.I.R. 1940 Bom. 307 (F.B.).

——S. 100 (1) and (3)—*Construction—Scope—Schedule VII, List I, Item* 45 *and List II, Item* 48 *—Scope of—Respective powers of the centre and of the Provinces to impose taxes—C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act of* 1938—*If* ultra vires—*Tax on retail sales of motor spirits and lubricants—If excise duty or tax on sale of goods.*

If a tax is covered by the Federal List (List I of Sch. VII to the Government of India Act of 1935), and not covered by the Provincial List

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(List II of the said Schedule), then the Provincial Legislature cannot impose such a tax and it would be invalid. If a tax is covered by the Provincial List and not covered by the Federal List, then the validity of tax cannot be questioned. But if a tax falls within both the Lists, then such a tax will be *ultra vires* the Provincial Legislature by reason of the non-obstante clause in S. 100 (1) of the Government of India Act. But it is a fundamental assumption that the legislative power of the centre and the Provinces could not have been intended to be in conflict with one another, and the Court must therefore read them together and interpret or modify the language in which one is expressed by the language of the other and arrive at a reasonable and practical construction of the language of the section so as to reconcile the respective powers they contain and give effect to all of them. It is only if such a reconciliation should prove impossible and only then will the non-obstante clause in S. 100 (1) operate and the Federal power prevail, for the clause ought to be regarded as a last resort. Sec. 3 of the C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act of 1938 and all the provisions thereof levying "a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales" is not *ultra vires* the Legislature of the Central Provinces and Berar. It falls under Item 48 of List II in Sch. VII of the Act as "a tax on the sale of goods" and is not covered by Item 45 in List I of Sch. VII as a "duty of excise" (*Gwyer, C.J., Sulaiman and Jayagar, JJ.*) *In the matter of* C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938. **I. L. R (1939) Kar. (F. C.) 6=1939 F. C. R. 18=180 I.C. 161=11 R.F.C. 1=2 F L. J. 6=20 Pat.L.T. I.C. 161=11 R.F.C. 1=2 F L. J. 6=20 Pat.L.T. 197=1939 O L.R. 144=5 B R. 405 (2)=43 C W. N (F. C. R.) 1=1939 P.W.N 453=49 L W. 36= 1939 M.W.N. 25=A.I.R. 1939 F. C. 1=(1939) 1 M.L J. (Supp.) 1.**

——**S. 100 (1) and (3)**—List 1, items 54 and 55 and list 3, item 42—Urban Immovable Property Tax imposed by Bombay Finance Act of 1932—Nature of tax—Validity—If *ultra vires* *See* BOMBAY FINANCE ACT (1932 AS AMENDED IN 1939), PART VI. **42 Bom L.R 10 (F.B.).**

——**S. 104**—United Provinces Regularisation of Remissions Act if falls within residual powers. *See* U. P. REGULARISATION OF REMISSIONS ACT. **1940 A.W.R. (H C.) 208 (F.B.).**

——**S. 107**—*Applicability and scope of.*

Per *Iqbal Ahmad, J.*—S. 107 of the Government of India Act affects the relations between the Federal Legislature and the Provincial Legislature where the laws passed by the two Legislatures are among the subjects in the concurrent Legislative List and are repugnant to each other. It has no application to repugnancy due to overlapping found between the Provincial List on the one hand and the Federal and concurrent lists on the other. (*Iqbal Ahmad, Baipai and Mohammad Ismail, JJ.*) ATIQA BEGUM *v.* ABDUL MAGHNI KHAN. **I.L.R. (1940) All. 455=188 I.C. 586 =13 R.A. 27=1940 R.D. 135=3 Fed.L.J. (H.C.) 83=1940 A.L.J. 274=1940 A.W.R. (H.C.) 208=A.I.R. 1940 All. 272 (F.B.).**

——**S. 107**—*Bihar Act (IX of 1938), S. 15—If repugnant to S. 38, C.P. Code, and void as such.*

S. 15 of Bihar Act (IX of 1938) is not void

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under S. 107 of the Government of India Act of 1935, as being repugnant to S. 38, C.P. Code, an existing Indian law. The C.P. Code does not by itself apply to suits for rent. The procedure and regulation of Rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislature, and it is quite open to the latter to amend S. 143 of the Bihar Tenancy Act which makes the C.P. Code to some extent applicable to rent suits, and provide new procedure for the trial of rent suits. (*Khaja Mohamed Noor and Chatterji, JJ.*) RAZUR RAHMAN *v.* UDIT SINGH. **18 Pat. 694=6 B.R. 106=185 I.C. 135=12 R.P. 303=1939 P.W. N. 530=20 Pat.L.T. 492=A.I.R. 1939 Pat. 570.**

——**S. 107**—Bihar Money-Lenders Act (1939) if repugnant to existing Indian law and so void. *See* BIHAR MONEY-LENDERS ACT (VII OF 1939). **20 Pat.L.T. 473=A.I.R. 1939 F.C. 74.**

——**S. 107**—*Repugnancy of provincial law to existing Indian law—Principles of construction.*

Per *Sulaiman, J.*—When the question is whether a provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further, repugnancy must exist in fact, and not depend merely on a possibility. If the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be *ultra vires* in the former, while *intra vires* in the latter. A law which is *ultra vires* in part only may thereby become *ultra vires* in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. **I.L.R. (1939) Kar. (F.C.) 165=(1939) F.C.R. 193=12 R. F.C. 1=2 F.L.J. 183=43 C.W.N. (F.C.R.) 193=182 I.C. 161=1939 O.L.R. 399=5 B.R. 756=1939 M.W.N. 674=1939 P.W.N. 533=20 Pat.L.T. 473=71 C.L.J. 369=A.I. R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

——**S. 107**—*Repugnancy—Test.*

If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law. (*Mitter and Rau, JJ.*) G. P. STEWART *v.* BROJENDRA KISHORE. **184 I.C. 689=12 R.C. 271=69 C.L.J. 573=2 F.L.J. 112=43 C.W.N. 913=A.I.R. 1939 Cal. 628.**

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——S. 107 (1)—"Existing Indian Law"—Bihar Money-Lenders Act (III of 1938)—If repugnant to existing Indian law and void. *See* BIHAR MONEY-LENDERS ACT, S. 11. **1938 P.W.N. 913 (F.B.).**

——S. 109 (2)—*Assent of Governor—Objection as to absence of previous sanction under S.* 299 (3)—*Maintainability.*

If an Act has received the assent of the Governor, its validity cannot be thereafter questioned on the ground that previous sanction to its introduction as required by sub-S. (3) of S. 299 of the Government of India Act was not obtained. (*Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.*) ATIQA BEGAM *v.* ABDUL MAGHNI KHAN. **I.L.R. (1940) All. 455=188 I.C. 586=13 R.A. 27=3 Fed.L.J. (H.C.) 83=1940 R.D. 135=1940 A.L.J. 274=1940 A.W.R. (H.C.) 208=A.I.R. 1940 All. 272 (F.B.).**

——S. 150—*Provision of electric supply—If a purpose of India or part of India.*

Possibly under the Act of 1919 it might have been held that the generation and supply of electric current was not one of the purposes of the Government of India within the meaning of S. 20 of that Act. But under S. 150 of the Act of 1935, a public utility service such as the provision of electric supply is a purpose of India or of a part of India. (*Dalip Singh and Blacker, JJ.*) LAHORE ELECTRIC SUPPLY CO., LTD. *v.* SECRETARY OF STATE. **40 P.L.R. 927=178 I.C. 390=11 R. L. 449=A.I.R. 1938 Lah. 585.**

——S. 179—*Suit against Secretary of State—Description of defendant as "Government, Punjab Province through Deputy Commissioner"—If affects institution of suit.*

In a suit instituted against the Secretary of State, the description of the defendant as "Government, Punjab Province through Deputy Commissioner" does not in any manner affect the institution of the suit. Under the present Government of India Act all that is necessary to be mentioned is the "Province". The addition of the words "through Deputy Commissioner" does not cause any prejudice to the defendant. (*Din Mahomed, J.*) MAHOMED SHAFI *v.* SIALKOT MUNICIPALITY. **42 P.L.R. 550=A.I.R. 1940 Lah. 451.**

——S. 179 (1)—*Misdescription of respondent—If justifies dismissal of appeal.*

No doubt under S. 179 (1) of the Government of India Act, an appeal should be lodged against the Secretary of State and not against the Secretary of State for India in Council. But the mere addition of the words "for India in Council" does not justify the dismissal of the appeal, as at the worst it could only be construed as a misdescription of the respondent. (*Din Mohammad, J.*) SAMUNDER KHAN *v.* SECRETARY OF STATE FOR INDIA. **183 I.C. 59=12 R.L. 95=41 P.L.R. 134 =A.I.R. 1939 Lah. 298.**

——S. 179 (2)—*Misdescription—Amendment.*

Where in a suit against the Secretary of State, the latter is wrongly described as "Secretary of State for India in Council" this is a mere misdescription which can be amended at any time by omitting the words "for India in Council". (*Dalip Singh, J.*) AMAR KAUR *v.* SECRETARY OF STATE. **A.I.R. 1939 Lah. 583.**

——S. 179 (2)—*Original suit pending at commencement of Act—Appeal—Province, if can be impleaded as respondent.*

An appeal is merely a continuation of the proceedings within the meaning of Sub-S. (2) of S. 179. Hence, if the original suit was pending at the commencement of Act of 1935, the Province cannot be impleaded as a respondent in appeal and the only respondent is therefore the Secretary of State within the meaning of Sub-S. (2) of S. 179. (*Dalip Singh and Blacker, JJ.*) LAHORE ELECTRIC SUPPLY CO., LTD. *v.* SECRETARY OF STATE. **40 P.L.R. 927=178 I.C. 390=11 R.L. 449=A. I.R. 1938 Lah. 585.**

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——S. 204—*'Legal right'—Meaning of—Suit for declaration that S.* 106 (c) *of Cantonments Act is* ultra vires—*Jurisdiction of Federal Court.*

The United Provinces instituted in the Federal Court a suit against the Central Government represented by the Governor-General in Council for a declaration that S. 106 (*c*) of the Cantonments Act (II of 1924) was *ultra vires* the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924.

Held, that the dispute with regard to the validity of S. 106 (*c*) of the Cantonments Act involved a question on which the existence of a legal right depended, within the meaning of S. 204 (1) of the Government of India Act, 1935, notwithstanding the fact that before the Act of 1935 the provinces could not have sued the Central Government in any Court of law, and the Federal Court had therefore jurisdiction to entertain the suit.

Per *Sulaiman, J.*—The term 'legal right' used in S. 204 obviously means right recognised by law and capable of being enforced by the power of a State, but not necessarily in a Court of law. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty, even though no action may actually lie. The mere fact that under the previous Act the Provincial Governments were subordinate administrations under the control of the Central Government and could only have made a representation to the Governor-General in Council or the Secretary of State, would not be sufficient in itself for holding that the former could not possibly possess any 'legal rights' at all against the Central Government, even in respect of rights conferred upon them by the provisions of the Act or the rules made thereunder. If a 'legal right' existed under the old Act, S. 204 of the new Act would not be inapplicable merely because the right related to an earlier period. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) THE UNITED PROVINCES *v.* THE GOVERNOR-GENERAL IN COUNCIL. **I.L.R. (1939) Kar. (F.C.) 98=1939 F.C.R. 124 =11 R.F.C. 44 (2)=50 L.W. 209=1939 P.W.N. 555=1939 M.W.N. 750=180 I.C. 863=5 B.R. 554=40 Cr.L.J. 403=1939 O.L.R. 246=2 Fed. L.J. 123=A.I.R. 1939 F.C. 58=(1939) 2 M.L.J. (Supp.) 1.**

——S. 205—*Appeal to Federal Court—Discretion of High Court—Interference—Practice.*

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When the question is one of a discretion of the High Court, the Federal Court will not in appeal interfere with the way in which the discretion was exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law; and if there is no legal objection to the way in which discretion has or has not been exercised by the High Court, the Federal Court would not in appeal substitute its own discretion to that of the High Court. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) JAI GOBIND SINGH *v.* LACHMI NARAIN RAM. **187 I.C. 796=1940 O.L.R. 343=6 B.R. 589=I.L.R. (1940) Kar. (F.C.) 33 =12 R.F.C. 39=1940 P.W.N. 614=44 C.W.N. (F.C.R.) 21=3 F.L.J. 46=A.I.R. 1940 F.C. 20 =(1940) 1 M.L.J. (Supp.) 14.**

——S. 205—*Certificate refused by High Court —Reasons for refusal—Power of Federal Court to enquire into.*

A certificate under S. 205 of the Government of India Act is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for the Federal Court to enquire into the reasons for the refusal, against which no appeal lies to that Court. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) KISHORE LAL *v.* GOVERNOR-IN-COUNCIL, PUNJAB. **185 I.C. 801=3 Fed.L.J. (P. 1) 12= 1940 M.W.N. 180=1940 O.L.R. 100=6 B.R. 336=71 C.L.J. 108=12 R.F.C. 17=44 C.W.N. (F.C.R.) 17=I.L.R. (1939) Kar. (F.C.) 191= A.I.R. 1940 F.C. 4.**

——S. 205—*Certificate, when can be given.*

According to S. 205 (1) of the Government of India Act a certificate can be given only when a substantial question of law as to the interpretation of the Government of India Act, 1915 or any order in council made thereunder is involved. (*Thomas, C.J. and Zia-ul-Hasan, J.*) MAQBOOL HUSSAIN *v.* EMPEROR. **188 I.C. 846=41 Cr.L. J. 695=13 R.O. 31=1940 O.L.R. 385=1940 A. W.R. (C.C.) 250=1940 A. Cr. C. 77=1940 O. W.N. 494=1940 O.A. 459=A.I.R. 1940 Oudh 382.**

——S. 205—*Duty imposed on the High Court by S. 205—Effect of the absence of certificate.*

S. 205 of the Government of India Act imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order the giving or withholding of the certificate. On such determination, the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate should be recorded, not only for the information of the parties, but also for the certification of the Judicial Committee of the Privy Council and the Federal Court as to their jurisdiction to entertain an appeal. In the absence of any such certificate in the appeal before them their Lordships held that the appeal should be dismissed. (*Lord Thankerton.*) ERROL MACKAY *v.* OSWALD FORBES. **185 I.C. 549=1940 A.W.R. (P.C.) 6=1940 O.W.N. 32=67 I.A. 64=I.L.R. (1940) 1 Cal. 286=1940 A.L.J. 60=1940 O.L.R. 47=51 L.W. 93=70 C.L.J. 566=1940 M.W.N. 114=12 R.P.**

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C. 103=44 C.W.N. 317=6 B.R. 265=I.L.R. (1940) Kar. (P.C.) 72=42 P.L.R. 117=1940 P.W.N. 188=21 Pat.L.T. 199=42 Bom.L.R. 315=3 F.L.J. (P.C.) 1=A.I.R. 1940 P.C. 16= (1940) 1 M.L.J. 64 (P.C.).

——S. 205—*Final order—Appeal to High Court against order dismissing application under Ss. 16 and 17 of Bihar Money-lenders Act (III of 1938)—Dismissal—Appeal to Federal Court—If lies.*

Per *Gwyer, C.J. and Varadachariar, J.*—Ss. 16 and 17 taken together secure a substantial benefit to the judgment-debtor, namely, that he shall not by reason of any forced sale in a Court auction be deprived of his property for less than its fair value. The dismissal of an appeal by the High Court against an order dismissing application under Ss. 16 and 17, Bihar Money-lenders Act (III of 1938), has the effect of finally denying to the appellant this advantage, and the order of the High Court must to this extent be treated as determining a question of rights between the parties and not merely a question of procedure. The right which the appellant has thus lost is different from what is available to him under O. 21, R. 90, C. P. Code. Hence the order of the High Court must be treated as a final order for the purposes of S. 205, Constitution Act, and an appeal to Federal Court therefore lies.

Per *Sulaiman, J.*—The word 'judgment' does not include every order. Similarly, decree must involve a determination of the rights of the parties. The order of the High Court dismissing the appeal from the lower Court's order refusing to fix the valuation or to specify a portion of the mortgaged property in the proclamation of sale is neither a judgment, decree nor a final order within the meaning of S. 205 (1) of the Act. No appeal therefore lies to the Federal Court. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. **(1939) F.C.R. 193=12 R.F.C. 1=2 F.L.J. 183=182 I. C. 161=43 C.W.N. (F.C.R.) 193=1939 O.L.R. 399=I.L.R. (1939) Kar. (F.C.) 165=5 B.R. 756=1939 M.W.N. 674=1939 P.W.N. 533=20 Pat.L.T. 473=71 C.L.J. 369=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

——S. 205—*Grant of certificate—Case involving validity of certain Act—Act subsequently repealed and re-enacted—Certificate, if becomes infructuous—Jurisdiction of Federal Court to hear other grounds.*

A case involved a question of law relating to the constitutional validity of S. 11 of the Bihar Money-Lenders Act of 1938 and the High Court accordingly granted in January, 1939, a certificate under S. 205 (1) of the Constitution Act. On 1st May, 1939, the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, which repealed and re-enacted with retrospective effect the provisions of S. 11 of the Act of 1938 came into force. An application to the High Court for admission of the appeal was made on 11th May, 1939, and the appeal was admitted in the month of October. It was contended before the Federal Court that since the Act of 1938 had been repealed, the certificate had become infructuous and the Federal Court had no longer jurisdiction to hear the appeal either on the constitutional issue or on any other ground.

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Held, (1) that the certificate under S. 205 (*i*) vested the Federal Court with jurisdiction to hear the appeal and the subsequent repeal of the Act of 1938 could not divest the Court of its jurisdiction; (2) that the fact that the relief which the appellants claimed arose from an Act which was not law when the certificate was granted was quite immaterial inasmuch under S. 205 (2) once a certificate has been granted, the appellant can appeal on any ground whatever with the leave of the Court.

Obiter.—The jurisdiction of the Court to entertain the appeal would not be excluded even if the appellant declined to argue before the Court that the decision of the High Court on the constitutional question with respect to which the certificate has been granted, was wrong. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SUBHANAND CHOWDHARY *v.* APURBA KRISHNA MITRA. **3 F.L.J. 58=1940 P.W.N. 337=6 B.R. 499=187 I.C. 436=1940 M.W.N. 682=1940 O.L.R. 249=52 L.W. 127=44 C.W.N. (F.C.R.) 18=12 R.F.C. 18=I.L.R. (1940) Kar. (F.C.) 45=21 Pat.L.T. 621=A.I.R. 1940 F.C. 7=(1940) 1 M.L.J. (Supp.) 23.**

———S. 205—*Grant of certificate on ground that validity of certain Act was involved—Act repealed and replaced by new Act after decree of High Court—Validity of certificate—Maintainability of appeal—Appellant's right to rely on new Act—Bihar Money-Lenders Act.*

The plaintiff filed a suit for the recovery of a certain sum and interest thereon till the date of suit. The High Court of Patna, holding that the Bihar Money-Lenders Act of 1938, which gave certain reliefs to debtors was *ultra vires* the Provincial Legislature decreed the suit, but granted a certificate under S. 205 (1) of the Government of India Act on the ground that the case involved a constitutional issue, *viz.*, the validity of S. 11 of the said Bihar Act of 1938. Shortly afterwards, this Act was repealed and re-enacted with retrospective effect by the Bihar Money-Lenders Act of 1939 and in the petition of appeal lodged in the Federal Court the appellant relied on S. 7 of the Act of 1939 which replaced S. 11 of the Act of 1938.

Held, (*i*) that the certificate did not become void or inoperative owing to the fact that, after the granting of the certificate, the Act of 1938 had been repealed and replaced by a new Act, and the appellant was, therefore, entitled to maintain the appeal; (*ii*) that, in the circumstances, the appellant could not be tied down to the grounds mentioned in his application to the High Court for admitting the appeal; in any event, the Federal Court had ample power to grant leave for taking such a ground under S. 205 (2) of the Constitution Act; (*iii*) that the appellant was entitled to the benefit of the Act of 1939 even though it was passed only after the decision of the High Court. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SURENDRA PRASAD NARAIN SINGH *v.* GAJADHAR PRASAD. **3 F.L.J. 27=187 I.C. 612=6 B.R. 508=1940 O.L.R. 275=1940 P.W.N. 542=12 R.F.C. 25=44 C.W.N. (F.C.R.) 1=I.L.R. (1940) Kar. (F.C.) 14=71 C.L.J. 557=21 Pat.L.T. 753=1940 M.W.N. 686=A.I.R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

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———S. 205—*Refusal of certificate by High Court—Grant of special leave—Jurisdiction of Federal Court.*

Where the High Court has refused to grant a certificate under S. 205 (1) of the Government of India Act, the Federal Court has no inherent jurisdiction to grant special leave to appeal. The Federal Court being a statutory Court, its jurisdiction must be collected from the terms of the statute which created it and there is nothing in the statute which gives the Court power to entertain an application for special leave to appeal. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) LAKHPAT RAM *v.* BEHARI LAL MISSIR. **1939 F.C.R. 121=180 I.C. 550=11 R.F.C. 44 (1)=5 B.R. 529=1939 M.W.N. 359=1939 O.L.R. 210=49 L.W. 570=I.L.R. (1939) Kar. (F.C.) 96=20 Pat.L.T. 263=1939 P.W.N. 203=2 Fed.L.J. 121=A.I.R. 1939 F.C. 42.**

———S. 205—*Vacating of certificate given—Power of High Court—C. P. Code, Ss.* 151 *and* 152.

The High Court has no power either under S. 152, C. P. Code, or in the exercise of inherent powers, to vacate or alter a certificate which was correct at the time when it was made or given because of the happening of some subsequent event. (*Gwyer, C.J., Sulaiman and Varadacharair, JJ.*) SUBHANAND CHOWDHARY *v.* APURBA KRISHNA MITRA. **187 I.C. 436=1940 P.W.N. 337=6 B.R. 499=1940 O.L.R. 249=52 L.W. 127=12 R.F.C. 18=1940 M.W.N. 682=I.L.R. (1940) Kar. (F.C.) 45=21 P.L.T. 621=44 C.W.N. (F.C.R.) 18=3 F.L.J. 58=A.I.R. 1940 F.C. 7=(1940) 1 M.L.J. (Supp.) 23.**

———S. 205 (1)—*Cause of action arising before Act of* 1935 *and judgment founded on provisions of earlier Act—Such provisions re-enacted in Act of* 1935— *Question of law as to interpretation of Act of* 1935—*If arises.*

It cannot be said that since S. 240 of the Act of 1935 had re-enacted with amendments S. 96-B of the earlier Act (on which the appellant's cause of action was based) the Act of 1935 must *pro tanto* be regarded as retrospective, so that a Court which had founded its judgment on the provisions of S. 96-B must in law be deemed to have been interpreting the provisions of S. 240 of the Act of 1935. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) PASHUPATI BHARTI *v.* SECRETARY OF STATE. **1939 F.C.R. 13=180 I.C. 547=49 L.W. 17=1939 P.W.N. 4=20 Pat.L.T. 66=2 Fed.L.J. 1=1939 M.W.N. 356=1939 O.L.R. 211=5 B.R. 527=11 R.F.C. 41=1938 O.W.N. 1251=A.I.R. 1938 F.C. 1.**

———S. 205 (1)—*Certificate under—Effect of—Civil Revision Petition—Order of dismissal by single Judge—Certificate that substantial question as to interpretation of Act is involved—Appeal to Federal Court—Competency—C. P. Code, O.* 45, *Rr.* 2 *and* 17—*Petition under—Procedure.*

An order by single Judge of the High Court dismissing a Civil Revision Petition is a final order, and when the Judge has passed a final judgment and certified that a substantial question of law as to the interpretation of the Government of India Act is involved under S. 205 (1) of the Act, an appeal to the Federal Court is competent and must be admitted. In a petition filed under O. 45, Rr. 2 and 17, C. P. Code, for

leave to appeal to the Federal Court, it is unnecessary for the Court to consider whether there is a substantial question of law involved as to the interpretation of the Government of India Act, when the matter has already been dealt with under S. 205 (1) by the Court on the passing of its judgment, decree, or final order; and it is also unnecessary for the petitioner to apply for a certificate or for the Court to grant one. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) SUBRAMANIAN CHETTIAR *v.* MUTHUSWAMI GOUNDAN. **52 L.W. 240=1940 M.W.N. 849=(1940) 2 M. L.J. 170.**

———**S. 205 (1)**—*Construction—"Judgment, decree or final order"—Meaning—Federal Court —Jurisdiction in criminal matters.*

Gwyer, C.J.—The Federal Court has jurisdiction in civil as well as in criminal matters. The words "judgment, decree or final order" ought to receive no narrow interpretation.

Sulaiman, J.—It may be assumed that the words "judgment or final order" in S. 205 (1) of the Government of India Act apply to criminal cases as well, but an order of the High Court directing the re-hearing of a criminal appeal by the Sessions Court is not "judgment" within the meaning of the section.

Varadachariar, J.—S. 205 of the Government of India Act is not in terms limited to civil cases, and the word "judgment" is comprehensive enough to include a judgment pronounced in a criminal case. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) HORI RAM SINGH *v.* EMPEROR. **(1939) F.C.R. 159=I.L.R. (1940) Lah. 400= 5 B.R. 685=11 R.F.C. 60=1939 M.W.N. 497= 40 Cr.L.J. 468=1939 O.L.R. 366=1939 P.W.N. 429=50 L.W. 95=43 C.W.N. (F.C.R.) 50=20 Pat.L.T. 539=41 P.L.R. 680=181 I.C. 317= 2 Fed.L.J. 153=71 C.L.J. 340=A.I.R. 1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23.**

———**S. 205 (1)**—*High Court refusing to grant certificate—Revision—Power of Federal Court.*

Though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes, there is no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts. The concluding words of S. 205 (1) which impose a duty on every High Court to consider in each case whether or not a substantial question of law as to the interpretation of the Act or of any Order in Council made thereunder is involved, "and of its own motion to give or to withhold a certificate accordingly" may reasonably be construed as giving the High Court the last word in the matter, so far as this section is concerned; and as there is no statutory powers of revision or superintendence possessed by the Federal Court like those possessed by the High Court under S. 224, Government of India Act or S. 115, C. P. Code, the Federal Court cannot entertain in exercise of its inherent power, an application for revision of an order of a High Court refusing to grant a certificate under S. 205 (1). (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) PASUPATI BHARTI *v.* SECRETARY OF STATE. **1939 F.C. R. 13=180 I.C. 547=49 L.W. 17=1939 P.W.N. 4=20 Pat.L.T. 66=2 Fed.L.J. 1=1939 M.W.N. 356=1939 O.L.R. 211=5 B.R. 527=11 R.F.C. 41=1938 O.W.N. 1251=A.I.R. 1938 F.C. 1.**

———**S. 205 (1)**—*"Judgment, decree or final order"—Opinion given by High Court on reference under S. 432, Cr. P. Code.*

An opinion given by the High Court on a reference under S. 432, Cr. P. Code, is not a "judgment or decree or final order" of that Court within the meaning of S. 205 (1) of the Government of India Act. (*Derbyshire, C.J., Nasim Ali and Rau, JJ.*) EMPEROR *v.* HEMENDRA PROSAD. **I.L.R. (1939) 2 Cal. 411=183 I.C. 349=12 R.C. 153= 69 C.L.J. 599=2 F.L.J. (Part II) 55=40 Cr.L. J. 782=43 C.W.N. 950=A.I.R. 1939 Cal. 529 (S.B.).**

———**S. 205 (1)**—*Jurisdiction of Federal Court —Certificate of High Court—If condition precedent.*

The certificate of the High Court that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder is a condition precedent to the exercise of jurisdiction by the Federal Court, although if the certificate has once been given, the case is at large and the applicant is not necessarily restricted in arguing his appeal to what may be called the constitutional issue. But until the certificate has been granted, the Federal Court cannot entertain the case at all. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) PASUPATHI BHARTI *v.* SECRETARY OF STATE. **1939 F.C.R. 13 =180 I.C. 547=49 L.W. 17=1939 P.W.N. 4= 20 Pat.L.T. 66=2 Fed.L.J. 1=1939 M.W.N. 356=1939 O.L.R. 211=5 B.R. 527=11 R.F.C. 41=1938 O.W.N. 1251=A.I.R. 1938 F.C. 1.**

———**Ss. 205 (1), 224**—*Refusal to interfere under Ss. 115, C. P. Code and 224 of the Government of India Act with order of a trial Court— Certificate under S. 205 (1), if can be granted.*

Where the High Court refuses to interfere under S. 115, C. P. Code and S. 224 of the Government of India Act, with the order of a trial Court, refusing to decide the question of jurisdiction, as a preliminary issue it is not a fit case to be certified under S. 203 (1) of the Government of India Act as no question of interpretation of S. 224 was involved. It is not the function of the High Court under S. 224 to interfere with judicial orders of the subordinate Courts. (*Ismail, J.*) LAKSHMI IRON AND STEEL MANUFACTURING CO., LTD. *v.* RADHEYLAL MANNILAL. **180 I.C. 31=11 R.A. 412=1938 A.L.J. 911=1938 A.W.R. (H.C.) 624=A.I.R. 1938 All. 639.**

———**S. 205 (1)**—*Scope—Order of Foreign and Political Department No. 34 I. B., dated 14th January, 1937—Not one under 1935 Act—Decision of High Court on interpretation of such order— Certificate—Right to.*

There was no power under the Government of India Act, 1935, to make any Orders in Council relating to Foreign Jurisdiction until 1st April, 1937. As the order of the Foreign and Political Department No. 34, I.B., dated 14th January, 1937, made by Governor-General-in-Council in the exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, was made on 14th January, 1937, it cannot possibly be said to have been an order made under the Government of India Act, 1935. Hence, a certificate cannot be granted from the decision of the High Court on the interpretation of such order. (*Harries, C.J. and Agarwala, J.*) HARAMO-

GOVT. OF INDIA ACT (1935), S. 205.

HAN PATNAIK *v.* EMPEROR. 196 I.C. 442=1939 P. W.N. 858=6 B.R. 371=41 Cr.L.J. 313=12 R.P. 510=21 Pat.L.T. 252=A.I.R. 1940 Pat. 109.

———S. 205 (2)—*Refusal of High Court to grant certificate—Litigant's right to appeal to Privy Council.*

A litigant who, apart from S. 205, would have a right of appeal to the Privy Council, is not deprived of that right by the refusal of the High Court to grant a certificate. S. 205 (2) only applies where a certificate is given and has no application to a case where it has been refused. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) PASUPATHI BHARTI *v.* SECRETARY OF STATE. 1939 F. C.R. 13=180 I.C. 547=49 L.W. 17=1939 P.W. N. 4=20 Pat.L.T. 66=2 Fed.L.J. 1=1939 M. W.N. 356=1939 O.L.R. 211=5 B.R. 527=11 R.F.C. 41=1938 O.W.N. 1251=A.I.R. 1938 F.C. 1.

———S. 208—*Leave to appeal—Grant of—Conditions.*

Unless special circumstances are shown which would justify the grant of leave to appeal to the Privy Council, the Federal Court will not ordinarily grant such leave. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) HORI RAM SINGH *v.* EMPEROR. 181 I.C. 947=11 R.F.C. 75=1939 O. L.R. 416 (1)=40 Cr.L.J. 599=2 F.L.J. 206= 1939 P.W.N. 522=1939 M.W.N. 616=5 B.R. 771=71 C.L.J. 390.

———S. 209 (1)—*Remission of case to High Court—Powers of Federal Court.*

The Federal Court in the exercise of its appellate jurisdiction can remit under Ss. 205 and 209 (1) a case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognizes the state of the law which comes into force while the appeal to Federal Court is pending, without discussing the law as it existed at the time when the High Court had seisin of the case. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. (1939) F.C.R. 193 =12 R.F.C. 1=2 F.L.J. 183=182 I.C. 161=43 C.W.N. (F.C.R.) 193=1939 O.L.R. 399=5 B. R. 756=1939 M.W.N. 674=1939 P.W.N. 533= 20 Pat.L.T. 473=71 C.L.J. 369=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.

———S. 213—*Reference under—Onus—Case, answer and rejoinder—Procedure.*

Where a special reference under S. 213 of the Government of India Act relates to an Act of a Provincial Legislature and the Advocate-General of India chalienges its validity on behalf of the Governor-General of India, the onus is on him in the first instance to state the facts and arguments and authorities showing that the Act or any provisions thereof is or are *ultra vires* of the Provincial Legislature concerned. It would then be for the Advocate-General of that Province to file his case stating any further facts which may be considered necessary and meeting the arguments of the Advocate-General of India and citing the authorities upon which he proposes to rely at the hearing. The position would be reversed if a Province were challenging the validity of an Act of the Central Legislature. The question whether there should be any rejoinder by the party challenging the validity of the Act must be considered after the opposite party has filed his case. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, *In the matter of.* 1938 P.W.N. 609.

GOVT. OF INDIA ACT (1935), S. 222.

———S. 220 (4)—*Construction—"Enters upon his office"—Meaning—Additional Judge of High Court acting as such and in continuation made permanent Judge—Royal warrant issued before Act—Appointment to take effect after Act, in continuation of appointment as additional Judge—Fresh oath—Necessity.*

The oath prescribed by S. 220 (4) of the Government of India Act of 1935 is only necessary before entering upon the office as a Judge. Where a person appointed as an additional Judge of the High Court has continued as such without a break after taking the oath prescribed under Cl. 3 of the Letters Patent, and he is made a permanent Judge of the High Court by a Royal warrant signed and issued before the commencement of the Act—the appointment to take effect after the Act in continuation of his appointment as additional Judge,—it cannot be said that he *enters upon his office* as a Judge afresh necessitating a fresh oath which is required only for a person who enters upon his office for the first time. The fact that the additional Judge did not take the oath afresh on being made a permanent Judge would not invalidate his appointment or make the High Court otherwise than validly constituted. (*Sulaiman, C.J., Thom, Bennet, Harries and Bajpai, JJ.*) HIRA SINGH *v.* JAI SINGH. I.L.R. (1937) All. 880=1937 A.L.R. 800=171 I.C. 153=1937 A.W.R. 735=10 R.A. 228=1937 A.L.J. 840=A.I.R. 1937 All. 588 (F.B.).

———S. 222 (1)—*Scope and effect of—Letters Patent (Patna), Cl. 2—Death of Chief Justice during vacation—Effect of—Jurisdiction of Vacation Bench to decide cases during vacancy in office.*

Cl. 1 of S. 222 of the Government of India Act expressly recognises and provides for the contingency of the Office of Chief Justice of a High Court remaining vacant for some time. Cl. 2 of the Letters Patent (Patna) only determines the constitution of that High Court by declaring that it shall consist of a Chief Justice and a certain number of other Judges. In the case of a vacancy caused by death some time must necessarily elapse before a new appointment is made. It would be preposterous to hold that during the interval between the death and new appointment there is no properly constituted High Court. The vacancy in the office implies that the office exists which is distinct from the case of an abolition of the office. Where the Chief Justice of the High Court dies during the vacation of the High Court, the Office of Chief Justice does not die with him. It still continues, though it remains vacant till filled up. The constitution of the Court remains unbroken and unchanged. So far as the jurisdiction of a vacation Bench of the High Court to hear and decide cases is concerned, that cannot be questioned, because the Vacation Bench is not required to do any of the duties of the Chief Justice. The only effect of the vacancy in the office of Chief Justice, is that, so long as the vacancy continues, there would be no one to perform his duties until the Governor-General appoints some one of the other Judges to do the same under S.

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222 (1) of the Government of India Act. The death of the Chief Justice and the consequent vacancy in his office does not affect the jurisdiction of the Vacation Bench in the least or render it incompetent to pass orders in any case within its jurisdiction as provided by the law and the Rules of the High Court. (*Manohar Lall and Chatterjee, JJ.*) EMPEROR *v.* SOHRAI KOERI. **17 Pat. 574=19 Pat.L.T. 675=1938 P.W.N. 683=40 Cr.L.J. 41=11 R.P. 251=178 I.C. 376=5 B.R. 98=A.I.R. 1938 Pat. 550.**

———S. 224—*Applicability.*

Although S. 224 of the Government of India Act (1935) contains in effect a reproduction of the terms of S. 107 of the previous Government of India Act, it also contains a proviso which makes it clear that S. 224 has no application of itself to legal proceedings at all. (*Costello, Ag. C. J. and Edgley, J.*) BHAGWAN DAYAL *v.* CHANDULAL. **I.L.R. (1938) 1 Cal. 256=174 I. C. 51=10 R.C. 612=41 C.W.N. 1363=A.I.R. 1938 Cal. 23.**

———S. 224—Function of the High Court under—If can interfere with judicial orders of subordinate Courts. *See* GOVERNMENT OF INDIA ACT, Ss. 205 (1) AND 224. **1938 A.L.J. 911.**

———S. 224—*'Judgment'—Meaning of.*

The word 'judgment' as used in S. 224 of the Government of India Act is used in the English sense and embraces an order in the same way as the word 'judgments' used in the Letters Patent include not only judgments as understood by the C. P. Code in India, but also all final orders. (*Pollock, J.*) GHANASHYAM PRASAD *v.* VISHWANATH. **1940 N.L.J. 93.**

———S. 224—*Revision—Inherent powers of High Court.*

Outside the statutory provisions, *e.g.*, S. 224, Government of India Act and S. 115, C. P. Code, no High Court has any inherent powers of revision over the subordinate Courts within its jurisdiction, such for example as the Court of King's Bench in England has for centuries exercised over Courts inferior to itself. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) PASUPATI BHARTI *v.* SECRETARY OF STATE. **1939 F.C.R. 13=180 I.C. 547=49 L.W. 17=1939 P.W.N. 4=20 Pat.L.T. 66=2 Fed.L.J. 1=1939 M.W.N. 356=1939 O.L.R. 211=5 B.R. 527=11 R.F.C. 41=1938 O.W.N. 1251=A.I.R. 1938 F.C. 1.**

———Ss. 224 and 225—Scope—Proceedings initiated before Act—Revision by High Court—Jurisdiction under S. 107 of prior Act—If taken away. *See* GOVERNMENT OF INDIA ACT (1919), S. 107. **(1938) 2 M.L.J. 447.**

———S. 224 (1) and (2)—*Construction and scope—Powers of High Court existing before Act—If taken away or affected.*

Sub-S. (2) of S. 224 of the Government of India Act cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact S. 223 preserves those powers. All that S. 224 (2) means is that the High Courts cannot so interpret sub-S. (1) of that section as to usurp the powers which they did not possess before. S. 224 deals with the administrative functions of the High Court and it does not affect the powers conferred upon the High Courts by the Letters Patent and the Charter Act, powers co-extensive with those

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of the Court of the King's Bench in England, including the power to issue writs of *certiorari* in respect of proceedings of subordinate Courts, tribunals or officers acting judicially. (*Macklin and Lokur, JJ.*) MULJI SICKA & Co. *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **187 I.C. 8=12 R.B. 395=3 Fed.L.J. (H.C.) 61=41 Bom. L.R. 984=A.I.R. 1939 Bom. 471.**

———S. 224 (2)—*Interlocutory order—Revision.*

S. 224 (2) limits the High Court's powers to question judgments of inferior Courts to those given under the ordinary law. Hence High Court cannot entertain a revision from an interlocutory order which is not a decided case. (*Skemp, J.*) AMAR SINGH *v.* SECRETARY OF STATE. **40 P.L.R. 775=178 I.C. 292=11 R.L. 439=A.I.R. 1938 Lah. 442.**

———S. 224 (2)—Scope—Legal Practitioners Act, S. 36—Order of District Judge declaring person to be tout—Revision by High Court—Jurisdiction. *See* C. P. CODE, S. 115. **(1938) 2 M. L.J. 100.**

———S. 224 (2)—*Scope—Order of Village Headman under S. 10 of Regulation XI of* 1916 *—Appeal—Revision—Competency.*

An order passed by a Village Headman under S. 10 of Regulation XI of 1916 is not subject to appeal or revision. S. 224 (2) of the Government of India Act of 1935 excludes the High Court's jurisdiction in such cases. (*Lakshmana Rao, J.*) PERIANNA PILLAI, *In re.* **187 I.C. 92=41 Cr.L. J. 402=12 R.M. 703=50 L.W. 799=1939 M. W.N. 1223=A.I.R. 1940 Mad. 183.**

———S. 226—Applicability—"Concerning the revenue, etc."—Application to High Court to direct income-tax officer to forbear from assessing applicant—Competency. *See* INCOME-TAX ACT, Ss. 5 AND 64. **1940 I.T.R. 139=42 Bom. L.R. 414.**

———S. 226—*Scope—Bombay Finance Act* (1932 *as amended in* 1939)*—Tax imposed by—Question as to power of municipal authorities to raise—Jurisdiction of High Court to decide.*

The question whether the Urban Immovable Property Tax imposed by the Bombay Finance Act of 1932 as amended in 1939, Part VI, can be raised by the municipal authorities in the manner provided is a matter concerning the revenue, and therefore the jurisdiction of the High Court to determine the question is barred by S. 226 of the Government of India Act of 1935. (*Beaumont, C.J., Broomfield and Kania, JJ.*) SIR BYRAMJI JEEJEEBHOY *v.* PROVINCE OF BOMBAY. **I.L.R. (1940) Bom. 58=3 Fed.L.J. (H.C.) 25=186 I. C. 817=12 R.B. 379=42 Bom.L.R. 10=1939 I.T.R. 670=A.I.R. 1940 Bom. 65 (F.B.).**

———S. 226 (1)—*Construction—Matter 'Concerning the revenue or an act done in the collection thereof'—Declaration by the Court of Wards that a person is a disqualified proprietor—If affected by S.* 226 (1).

Even assuming that it is correct to say that the motive of Government in instituting and maintaining the Court of Wards was to safeguard estates from mismanagement and consequent inability to pay revenue, that is no justification for saying that an order of the Court of Wards declaring a female, a disqualified proprietor under S. 6 (*a*) is a matter 'concerning revenue or an act

ed of is one "purporting to be done in execution of his duty" as a public servant is substantially one of fact, to be determined with reference to the act complained of and to the attendant circumstances. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) HORI RAM SINGH *v.* EMPEROR. I.L.R. (1940) Lah. 400=1939 F.C.R. 159=5 B.R. 685=11 R.F.C. 60=40 Cr.L.J. 468=1939 O.L.R. 366=1939 P.W.N. 429=50 L.W. 95=43 C.W.N. (F.C.R.) 50=20 Pat. L.T. 539=41 P.L.R. 680=1939 M.W.N. 497=181 I.C. 317=2 Fed.L.J. 153=71 C.L.J. 340=A.I.R. 1939 F.C. 43=(1939) 2 M.L.J. (Supp.) 23.

———S. 270—*"Servant of the Crown"—Member of Bombay Subordinate Medical Service—Prosecution of—Consent of Governor—Necessity.*

It is quite obvious from a perusal of the various sections of Part X of the Government of India Act that crown services include the subordinate as well as the superior civil services and there is no warrant for holding that the chapter in general and S. 270 in particular apply only to the case of the superior civil services. A member of the Bombay Subordinate Medical service is a servant of the crown and doing duty as such within the meaning of S. 270 of the Act, and therefore the consent of the Governor is necessary for his prosecution in respect of an act done by him in the execution of his duty as a servant of the crown. (*Broomfield and Norman, JJ.*) S. D. MARATHE *v.* PANDURANG NARAYAN. I.L.R. (1938) Bom. 770=40 Bom.L.R. 825=177 I.C. 589=11 R.B. 98=39 Cr.L.J. 903=A.I.R. 1938 Bom. 419.

———S. 270 (1)—*Transfer of case commenced without Government's consent—Consent produced before* de novo *trial—Legality of proceedings.*

The provisions of sub-S. (1) of S. 270 are mandatory, and admit of no reservation or exception. They contain a positive prohibition against the institution of civil and criminal proceedings against the persons described in the section in respect of the acts mentioned, without such consent. In other words, the Government's consent is an essential pre-requisite to the competency of the Court to entertain the proceedings. It is the very foundation of the Court's jurisdiction, and its absence renders the entire proceedings void *ab initio*. Such an illegality cannot be cured under S. 537, Cr.P. Code, even when no prejudice has been shown to have been caused. Where therefore the initiation of proceedings is illegal for want of consent, but those proceedings are transferred to another Court which begins with the case afresh, subsequent production of consent even though it is before the commencement of the trial *de novo*, cannot validate what was invalid at its inception. (*Tek Chand and Blacker, JJ.*) ARJAN SINGH *v.* EMPEROR. I.L.R. (1940) Lah. 102=41 Cr.L.J. 65=12 R.L. 241 (2)=184 I.C. 680=42 P.L.R. 51=A.I.R. 1939 Lah. 479.

———S. 292—*Scope and effect of.*

S. 292 of the Government of India Act is more than a mere preserving section. It enjoins that all the law in force in British India immediately

before the commencement of part III shall continue to remain in force until altered or repealed or amended. This provision amounts to a direction that the alteration, repeal or amendment of any law in force at the time of the commencement of part III cannot be with a retrospective effect. (*Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.*) ATIQA BEGAM *v.* ABDUL MAGHNI KHAN. I.L.R. (1940) All. 455=188 I.C. 586=13 R.A. 27=3 Fed.L.J. (H.C.) 83=1940 R.D. 135=1940 A.L.J. 274=1940 A.W.R. (H.C.) 208=A.I.R. 1940 All. 272 (F.B.).

———S. 297 (1) (b)—*Construction and scope—"Locality"—If confined to localities in India—Products of foreign countries—If covered—Powers of taxation under section.*

Sulaiman, J.—An intention to discriminate is not essential to invalidate a legislation under S. 297 (1) and (2), but it is sufficient if the provisions of the enactment result in discrimination.

Quaere.—Whether the word "locality" in S. 297 (1) (*b*) should not be confined to localities in India, having regard to the marginal note to the section, and whether the section deals with products of foreign countries.

Jayakar, J.: Quaere.—Whether S. 297 (1) (*b*) does not posit a power to levy a tax on two sets of goods. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) *In the matter of* C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938. 1939 F.C.R. 18=180 I.C. 161=11 R.F.C. 1=2 F.L.J. 6=20 Pat.L.T. 197=1939 O.L.R. 144=5 B.R. 405 (2)=43 C.W.N. (F.C.R.) 1=1939 P.W.N. 453=49 L.W. 36=1939 M.W.N. 25=A.I.R. 1939 F.C. 1=(1939) 1 M.L.J. (Supp.) 1.

———S. 306—*Scope—Order of Provincial Government under S. 36, Madras District Municipalities Act, and issued in name of Governor under S. 59, Government of India Act, revising prior order—Application for writ of* certiorari*—Maintainability—Government of India Act, S. 49—Scope and effect.*

A temple tank vested in a Municipal Council was in an insanitary condition; and the cost of putting it into a proper condition having been found to be too costly, the Municipal Council decided to reduce the size of the tank. The temple trustee then moved the Provincial Government under S. 36 of the District Municipalities Act. The Government varied the order of the Municipal Council, but without hearing it. The latter then moved the Government to revise its order. The Government after hearing the Municipal Council upheld the original order of the Municipal Council, cancelling the Government's previous order. The order of the Government was issued in the name of the Governor of the Province as required by S. 59 of the Government of India Act. The temple trustee moved the High Court to issue a writ of *certiorari* against the Government and quash its order upholding the order of the Municipal Council and contended that the Government had no power to revise its own previous order.

Held, (1) that the Court had no jurisdiction to issue a writ or interfere with the order which was an executive order lawfully passed and issued in the name of the Governor, by reason of S. 306 of the Government of India Act. It cannot be

GOVT. OF INDIA ACT (1935), S. 317.

said that because the application was for a writ against the Provincial Government it was outside S. 306 of the Government of India Act of 1935. It was impossible to differentiate between the Governor and the Provincial Government in the matter and that S. 49 of the Government of India Act had no bearing on the question; (2) there was no warrant for holding that S. 49 was a bar to the Governor issuing an order under S. 36 of the Madras District Municipalities Act or that the Provincial Government alone could do it; (3) that it could not be said with reason that the Government had no power to cancel or vary its own executive order. If it had not this power a wrong would be without a remedy, which was contrary to all principle. (*Leach, C.J. and Kunhi Raman, J.*) THYAGARAJAN CHETTIAR *v.* SECRETARY TO GOVERNMENT OF MADRAS. **I.L.R. (1940) Mad. 204=186 I.C. 440=12 R.M. 631=50 L.W. 538=1939 M.W.N. 1013=2 F.L.J. 101=A.I.R. 1939 Mad. 940=(1939) 2 M.L.J. 801.**

———**S. 317 and Sch. 9 and Hindu Women's Right to Property Act (1937)**—*Scope and object of S. 317 and Sch. 9—Hindu Women's Right to Property Act is a validly passed Act.*

As till now no federal legislation has yet been brought into force as part of the Law of India, under the provisions of S. 317 and Sch. 9 of the Government of India Act, 1935, the law in regard to the Indian Legislature contained in the Government of India Act, 1919, has all along continued to be the law of British India. It appears that the provisions made in S. 317 and Sch. 9 is intended to continue the validity of the functions of the Indian Legislature. So the Hindu Women's Right to Property Act is a validly passed Act. (*Bennet and Verma, JJ.*) JANAK DULARI *v.* SRI GOPAL. **I.L.R. (1939) All. 912=185 I.C. 420=12 R.A. 326=1939 A. W. R. (H.C.) 655=1939 A.L.J. 875=2 F.L.J. 143=A.I.R. 1939 All. 706.**

———**S. 321, proviso (b)**—*Governor of Bengal appointed under old Act—Failure to appoint him in manner provided by new Act—Effect.*

The office of the Governor of Bengal created by the Government of India Act, 1935, is an office corresponding to the office of Governor of Bengal under the old Act. The appointment of the Governor of Bengal under the old Act takes effect, by virtue of proviso (*b*) to S. 321 of the new Act, as if it were an appointment to the corresponding office under the new Act, although he is not appointed to that office in the manner provided by the latter Act. (*Lort Williams, J.*) TULSHI CHARAN GOSWAMI *v.* AZIZUL HUQUE. **I.L.R. (1937) 2 Cal. 509=175 I.C. 225=10 R. C. 774=A.I.R. 1938 Cal. 163.**

———**Sch. V, Para. 20**—*Madras Legislative Assembly Electoral (Elections and Election Petitions) Rules* (1936), *Rr. 7, 29, proviso and* 103 *—Construction and scope—Member of Scheduled Caste elected to Assembly under proviso to R. 29, being the only validly nominated candidate—District Magistrate—Order of declaring election void under R.* 103—*Jurisdiction—High Court—Power to issue writ of* certiorari—*Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order* (1936).

The language of Rules 12 to 32 of the Madras

GOVT. OF INDIA ACT (1935), Sch. VII, List I.

Legislative Assembly Electoral (Elections and Election Petitions) Rules, 1936, formulated by the Governor-in-Council under the powers conferred on him by para. 20 of Sch. V of the Government of India Act, 1935, makes it quite clear that one position and one position alone is contemplated—the nomination and election of candidates to the panel in order to enable them to stand for final election to the Assembly. Those rules headed "Primary Elections" deal with candidates for election to the panel, and not to the Assembly, which is a later stage. R. 29 adumbrates the words "elected to the panel." R. 103 relates to primary elections held "for the purpose of electing candidates for a seat" and the orders contemplated by R. 103 (*c*) relate to orders passed in relation to such candidates. When a candidate is the only validly nominated candidate and is declared elected to the Assembly by the Returning Officer under the Proviso to Rule 29 of the Rules, the District Magistrate has no jurisdiction under R. 103 to declare such an election void. When once a person has attained the status of a member of Legislative Assembly, he should only be deprived of it by means of a formal election petition to the Covernor-in-Council as provided for in Rr. 2, 3 and 4 of Part III of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, passed by His Majesty in Council. There is no reason why the procedure so carefully elaborated in the rules should not apply to a member of a scheduled caste elected under R. 29, Proviso, as much as to any one else, in the absence of any clear provision to the contrary. If the District Magistrate declares such an election void under R. 103, the order being one passed by a tribunal which has no jurisdiction to pass the order, the elected candidate, who is deprived without jurisdiction of a valuable right is *prima facie* entitled to the issue of a writ of *certiorari* from the High Court, quashing the order. The power of the High Court to issue a writ of *certiorari* is not taken away by R. 7 of the Madras Legislative Council Rules read with para. 20 of Sch. V of the Government of India Act. Such power can only be taken away by express negative words and not merely by words which direct that certain matters should be finally determined. R. 7 does not prevent the High Court from issuing a writ of *certiorari* in a case where a subject has been deprived of a right of a tribunal acting wholly without jurisdiction. (*Mockett and Lakshmana Rao, JJ.*) B. S. MOORTHY *v.* VADAPALLI. **I.L.R. (1938) Mad. 162=173 I.C. 169=10 R.M. 524=45 L.W. 623=1937 M.W.N. 694=A.I.R. 1937 Mad. 660.**

———**Sch. VII, List I, Item 45 and List II, Item 48**—*"Excise"—"Taxes on the sale of goods"—Interpretation of.*

The term "excise" may have a wider meaning so as to include all duties levied on the consumption of excisable commodity at any stage from production to sale, but having regard to the context in which the expression is used and the scheme of the Government of India Act, and to avoid conflict with Item 48 in List II of Schedule VII, the expression "Duties of excise" as used in Item 45 of List I of Schedule VII must be con-

strued as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production and that it extends no further. A clear distinction exists between the first sale and the last sale as the latter is not intimately connected with the manufacturer or producer while the former is. If "excise" should be given the wider meaning, then the only taxes that would not amount to excise duty and would be left over for the Provinces to impose under Item 48 in List II would be licence fees and certain turnover taxes, which will be merely illusory and that could not have been the intention of Parliament in using the words "taxes on the sale of goods" in Item 48 in List II of Sch. VII to the Act. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) *In the matter of* C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, 1938. **1939 F.C.R. 18=180 I.C. 161=11 R.F.C. 1=2 F.L.J. 6=20 Pat.L.T. 197=1939 O.L.R. 144=5 B.R. 405 (2)=43 C.W.N. (F.C.R.) 1=1939 P.W.N. 453=49 L.W. 36=1939 M.W.N. 25=A.I.R. 1939 F.C. 1=(1939) 1 M.L.J. (Supp.) 1.**

———**Sch. VII, List III, Entry No. 4**—*"Civil Procedure"—If includes jurisdiction and powers of Courts.*

"Civil Procedure" in the Concurrent Legislative List in Sch. VII to the Government of India Act must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters in the second entry in the Provincial Legislative List. (*Mitter and Rau, JJ.*) G. P. STEWART *v.* BROJENDRA KISHORE. **184 I.C. 689=12 R.C. 271=69 C.L.J. 573=2 F.L.J. 112=43 C.W.N. 913=A. I. R. 1939 Cal. 628.**

GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER (1937), Rr. 9 and 10—Service of notice on Secretary of State—Absence of Crown pleader. *See* C. P. CODE, O. 27, R. 4. **1939 A.W.R. (H.C.) 216.**

GOVERNMENT OF INDIA (PROVINCIAL ELECTIONS) (CORRUPT PRACTICES AND ELECTION PETITIONS) ORDER (1936), Part III, Rr. 2, 3 and 4—Applicability—Primary election of panel of members of Scheduled castes—Election of candidate to Assembly as being the only duly nominated candidate—Procedure for declaring invalid and setting aside. *See* GOVERNMENT OF INDIA ACT (1935), SCH. V, PARA. 20. **45 L.W. 623.**

GOVERNMENT SECURITIES ACT (X OF 1920), S. 5—*Scope and effect of—Beneficial ownership in securities—If affected.*

The provisions of S. 5 of the Government Securities Act are only for the protection of the Government who can get a due discharge from the person who is the holder of the security. The question as to the beneficial ownership of Government promissory notes and securities is not affected by S. 5. (*Venkataramana Rao and Abdur Rahman, JJ.*) SAMPATHIRAYUDU *v.* VENKATARATNAM. **52 L.W. 247=1940 M.W.N. 841=A.I.R. 1940 Mad. 878=(1940) 2 M.L.J. 278.**

GRANT—*Alienability—Jagir to be enjoyed so long as any descendants of the grantee should survive—Prohibition against alienation by grantee—Provision for resumption on unauthorised transfer—Nature of interest created—Saleability in execution of money decree against grantee.*

When a jagir is created by the Crown which can be enjoyed by the heirs of the grantee and which cannot be alienated or assigned, the interest of the grantee is a strictly limited interest, which is not assignable either by operation of law or by voluntary alienation. The measure of liability to involuntary alienation is the power of voluntary transfer. The jagir cannot be sold in execution of a decree for money against the jagirdar, the only manner in which the decree-holder can utilise for his own benefit the interest of the jagirdar in the property granted is by obtaining the appointment of a receiver of the rents and profits until his decree is satisfied or during the lifetime of the judgment-debtor whichever might be the shorter period. (*James and Rowland, JJ.*) UPENDRA SINGH *v.* MEGHNATH SINGH. **18 Pat. 370=5 B.R. 850=183 I.C. 56=12 R.P. 86=A. I.R. 1939 Pat. 598.**

———Ancient transaction—Validity—Presumption of—Discretion of Court—Permanent lease of waste lands of trust by trustee—Lapse of time—Grant for justifiable cause—If can be presumed. *See* TRUST—TRUSTEE. **1937 M.W.N. 1188.**

———*Chowkidari jagir—Resumability—Zamindar getting private services—Right to resume on ground of non-performance of services—Bengal Act VI of* 1870.

A Chowkidari jagir granted for Chowkidari work is a grant of a public nature and the services rendered by the Chowkidar are in their nature essentially public services. The lands held by him on service as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. A Zamindar is not therefore ordinarily entitled to resume Chowkidari land. Even if the Zamindar has been accustomed to demand certain private services from the Chowkidar, he is not entitled to resume the Chowkidari land merely because those services are no longer rendered so long as the holder of the land is the Chowkidar of the village.

Quaere:—Whether a Chowkidari jagir is liable to resumption under Bengal Village Chowkidari Act (VI of 1870) on the ground that the Chowkidar receives pay from the Chowkidari fund. (*Courtney-Terrell, C.J. and James, J.*) BHAGI MALIK *v.* SATYABADI OTA. **17 Pat. 315=11 R.P. 257=178 I.C. 372=5 B.R. 93=20 Pat. L.T. 93=A.I.R. 1938 Pat. 507.**

———*Colony land—Horse breeding grant—Condition of permanent settlement in estate—Permission obtained to appoint* sarbarah—*Effect of.*

One condition of a horse breeding grant is that the tenant must settle permanently in the estate to which the grant belongs. The fact that one Remount officer condones laxity in the performance of this condition and gives permission to the tenant to appoint a *sarbarah*, does not cancel the condition. The successor of this particular Remount officer may at any moment refuse to allow this laxity. (*Brayne, F.C.*) NUR MOHAMMAD *v.* QAZI ABDUL MAJID. **19 Lah.L.T. 9.**

———*Construction—Alienable estate—Use of words "and assigns"—Effect of.*

Where a grant of land expressly uses the words

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"and assigns" and it does not purport to make a *muafi* grants but makes an out and out grant, the intention of the grant is to confer an alienable estate upon the grantee. When there is nothing ambiguous about the grant, it would not be right to go behind it and beyond it into the past to see what the terms were upon which the land was held before the grant, so far as the question of alienability is concerned. (*Stone, C.J. and Bose, J.*) LAL CHAND *v.* DHANOO. **I.L.R. (1938) Nag. 229=10 R.N. 226=172 I.C. 580=A.I.R. 1938 Nag. 95.**

———*Construction—Conflicting descriptions—Which to prevail.*

Where there are two conflicting descriptions of the subject-matter of a grant or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been mistaken or to have been inserted inadvertently must prevail, if it sufficiently identifies the subject-matter. Preference ought to be given to that element of the description of the subject-matter which is most consistent with the intention of the parties to be collected from other parts of the deed, illumined, if necessary, by the surrounding circumstances and subsequent conduct of the parties. (*Niyogi, J.*) UMRAO BAPU *v.* RAMKRISHNA BAPU. **I.L.R. (1938) Nag. 50 =10 R.N. 235=172 I.C. 678=A.I.R. 1938 Nag. 93.**

———*Construction—Crown grant—Construction against subject.*

It is well-settled that a strict rule of construction against the subject and in favour of the crown applies to crown grants and to statutes affecting crow revenues. (*Davis, J.C. and Rupchand, A.J.C.*) RAMCHAND *v.* SECRETARY OF STATE FOR INDIA. **29 S.L.R. 382=163 I.C. 887 =9 R.S. 17=A.I.R. 1936 Sind 108.**

———*Construction—Crown grant of village—Irrigation tanks—If pass—Presumption.*

The Government cannot be presumed in making a grant to include in it communal property, *i.e.*, what the villagers own in common. Where tanks were primarily intended for irrigation purposes and were used as irrigation sources, the mere fact that the villagers sometimes used the water for other purposes, such as for drinking, for bathing or for washing cattle, does not suffice to create any rights of ownership in them. The true position in regard to irrigation tanks is that they do not belong to the community as such, the rights of irrigation, appertaining as they do, to the lands irrigated; such rights therefore as the owners of these lands possess, are in the nature of easements. Such tanks not being public or communal porambokes there is nothing to prevent their passing under the wide terms of a grant. Moreover where the tank or channel is wholly within the limits of the inam, it must be held to pass under the grant. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. **181 I.C. 688=11 R.M. 832=1938 M. W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193 =(1938) 2 M.L.J. 434.**

———Construction—Crown grant — Successive life-estates to grantee and his heirs—Prohibition on alienation—Effect of. *See* CROWN GRANTS ACT, S. 3. **1938 M.W.N. 440.**

———*Construction—Deshmukhi watan lands—*

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Maintenance grant to younger sons and their "Santati" and "waras"—Rights of widow and adopted son.

A suit was brought by the plaintiff claiming as the adopted son of one *A* to establish his right to the property of his adoptive father in the hands of the defendants. *A* died without issue but leaving three widows, the eldest of whom adopted the plaintiff. Defendants Nos. 1 and 2 were the other two widows and Defendant No. 3 was in possession of some of the property sold to him by Defendant No. 1. The lands in dispute originally formed part of Deshmukhi watan lands which were impartible and were governed by the rule of primogeniture. A suit was brought by the younger sons, *N* and *A*, against their father and elder brother to obtain a share of the lands for their maintenance, and the dispute was referred to arbitration. The award decree stated that *N* and *A* were to be given some of the income for the maintenance of themselves and their descendants (here the word used was Santati). Then followed a description of the lands allotted to each at the end of which it was stated: "He should accept the same and the permanent Vahiwat should continue with him and his heirs." Here the word used was "waras". The concluding paragraph stated that the father and the eldest son were the owners (*malak*) and Vahiwatdars of the remaining properties. On a construction of the award decree,

Held, that the grant to the younger sons was not an absolute grant but a grant of the lands for their maintenance but the grant was permanent so long as any heir remained, that although the word "Santati" would not include widows of the grantee, the word "waras" would include them and that the widows of *A* were, therefore, entitled to succeed to him under the terms of the award decree and that the word 'Santati' would anyhow include an adopted son.

Held, further, that even assuming that the widows did not succeed as *A's* heirs and that the estate had technically reverted to the senior branch, the adoption of the plaintiff by the eldest widow in the circumstances of the case was valid and had the effect of restoring the estate to the family of *A*. (*Broomfield and Macklin, JJ.*) DUNDOOBAI *v.* VITHALRAO. **60 Bom. 498=162 I.C. 780=8 R.B. 422=38 Bom. L. R. 193= A.I.R. 1936 Bom. 182.**

———*Construction — Dunlop's proclamation—Khoti-nisbat lands—Teak and other trees in—Right to—Permanent tenants of lands—Right of as against khot of village.*

Dunlop's proclamation is not a mere promise, but an actual grant or gift of the trees to the persons on whose lands they were then actually growing or might thereafter grow, and the gift cannot be revoked. So far as proprietary interest in the soil in Khoti-nisbat lands is concerned, the permanent tenants of the lands must be held to have greater rights than the Khot; and reading the proclamation as a whole it must be held that its terms were intended for the benefit of the persons who could ordinarily grow trees on the land and could derive benefit therefrom. Therefore teak and injayali trees growing on Khoti-nisbat lands covered by Dunlop's proclamation must be held to belong to the permanent

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tenants of those lands, and not to the Khot of the village who is not entitled to the benefit of the proclamation. (*Wassoodew and Indarnarayan, JJ.*) DAWOOD ABDUL REHMAN *v.* BALAJI DHARAMNAK. **I.L.R. (1940) Bom. 209=188 I.C. 54=12 R.B. 489=42 Bom.L.R. 239=A.I.R. 1940 Bom. 150.**

———Construction—Extent granted—Decision as to—Basis—Boundaries—When prevail—*Falsa demonstratio*—Doctrine of—When available—Intention of parties—Surrounding circumstances—Admissibility—Possession—Value of. *See* DEED—CONSTRUCTION. **1938 M.W.N. 335.**

———Construction—Grant of land with trees on it—Right to overhang branches on neighbour's land—If can be implied. *See* EASEMENT—IMPLIED GRANT. **71 M.L.J. 296.**

———*Construction—Grant of village—Tank not in existence at date of grant—If passes—Presumption.*

The legal presumption that everything in a village at the time of its grant belongs to the owner of the village cannot be availed of when an "oorni" (tank) in a village is not shown to be in existence at the time of the grant of the village. (*Pandrang Row, J.*) AVICHI CHETTIAR *v.* VALLIAPPA CHETTIAR. **163 I.C. 855=9 R.M. 80=A.I.R. 1936 Mad. 490.**

———*Construction—Grant of village to Math by Mogul Emperor confirmed by Maratha Kings—Continuance by British Government as Sarva inam or Devasthan inam—Description in inam register as jat inam—Effect—If grant to Math or to the head personally—Grant of sub-inam by head—Validity as against succeeding head—Right of latter to levy assessment from sub-inamdars.*

A village was granted in inam to the Sankaracharya of Sankeshwar Math or to that Math by the Mogul Emperor, Mahomed Shah, "in order that the grantee might spend the same on maintenance of *fakeers* (religious mendicants) and engage himself in praying for the continued existence of the everlasting kingdom". It was stated that the grantee was exempted from all civil dues and official taxes and that no one should under any circumstances come in his way for the purpose of recovering the revenue, etc. This grant was confirmed in 1760 by the then Maratha King by a fresh sanad, which recited that the grant of the village by way of sarva inam should be continued to enable him "to continue the annachatra, and other religious performances in the Sansthan continuously and perform the festivals of the anniversary days", etc..... "With all trees, water, stones and all other incidents." In 1863, the British Government continued the grant as sarva inam continuously to the Math so long as the jahagirs attached to the Math were continued, subject to such nazarana as Government might think fit to levy. From the terms of the decision of the inam commission it appeared that the inam was a devasthan inam granted to the Math, but in the alienation register the village was classed as jat inam, "to be claimed till the Sankaracharya Math is in existence". In 1803, the Sankaracharya of the Math granted in inam three lands in the village to the Ayya or Priest of the Ligayat Math in that village. In 1821, he made a similar grant of two lands in the same village

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to some other persons for the maintenance of their family and in consideration of the fact that they had rendered services to the grantor loyally for a long time and had been very useful. In 1735 one land in the same village was granted by the Sankaracharya in inam to a Brahman who had been performing his daily religious duties in the Math and who was well-versed in the Shastras and Vedas. In 1928, the appellant, the then Sankaracharya of the Math claimed assessment on the lands in all the three lands granted by the three respective grants by his predecessors-in-title from the present holders (other respondents) and on their refusal to pay, he recovered it from them through the revenue authorities. The respondents thereupon brought suits for a declaration that the appellant was not entitled to recover any amount from them by way of rent or assessment for the suit lands, for refund of the amounts already recovered and for a perpetual injunction restraining such levy in future.

Held, (1) that the grant was in the inam to the Math and in the nature of a devasthan inam, and the fact that for some reason or other the inam was entered in the alienation register as jat or personal inam did not make it any the less an inam to the Math, and being an inam to the Math, it was subject to all the conditions attaching to such inams; (2) that the grants in favour of the sub-inamdars (respondents) not being grants from the Crown must be construed in favour of the grantees; (3) that the grants to the respondents were granted free from the liability to pay assessment; (4) that the appellant's inam being in the nature of a devasthan, that is, an inam to a religious institution, each succeeding head of the Math would not be bound by the alienations which were not for legal necessity made by his predecessor, and would be entitled to repudiate them within 12 years of his becoming Mahant or head; and (5) that the appellant having asserted his right to recover the assessment within 3 years of his having become head of the Math, was entitled to recover the assessment, and the respondents were therefore not entitled to the declaration or any other relief in the suits. (*Wadia and Wassoodew, JJ.*) SHANKARACHARYA OF SANKESHWAR MATH *v.* CHANMALAPPA. **187 I.C. 513=12 R.B. 471=41 Bom.L.R. 1317=A.I.R. 1940 Bom. 112.**

———*Construction—Inam grant of* 1611 *for doing Acharia purusha service in temple—Grant described as* shrotriem—*Confirmation in* 1805 *in favour of descendant subject to performance of service—Nature of grant—If endowment for temple—Mortgage with possession—Validity—Suit to declare void—Limitation—Limitation Act, Art.* 144.

In construing a grant of such antiquity as one made as early as 1611, it is vain to except useful assistance from evidence of the manner in which the grant was viewed, say, in the present century. Where an inam grant made in 1611, is confirmed by the inam commissioner in 1865 on service tenure, that is to say, so long as the service is rendered in a devasthanam, the grant having been made for serving as Achariya Purusha in the devasthanam, and it is confirmed in the name of the great-grandson's great-grandson of the ori-

ginal grantee, disallowing the claim of the inamdar for the continuance of the inam as a personal grant the grant is one to the family of the grantee and the family would be entitled to the village granted subject only to the performance of service. The description of the inam as a *shrotriem* itself shows the nature of the grant, and makes it clear that it is to be held by the family in hereditary right subject to the performance of service in the temple. The property cannot be said to be an endowment of the temple, when the temple is not and is not intended to be given any interest in the property. It is clearly a case of a grant burdened with service. An alienation of land held on such tenure, by way of mortgage, is opposed not only to public policy, but also to the provisions of S. 6 (*h*), T. P. Act. A suit to declare that the mortgage is void is governed by Art. 144 and not by Art. 134-B of the Limitation Act. The transfer should be regarded as void from the date of the transfer itself, and the possession of the alienee must be deemed to be adverse from that date and it must continue to be adverse. A person who succeeds on the death of the alienor in such a case cannot be said to acquire then only a right to the property for the first time. The transferee would acquire by adverse possession for over 12 years a prescriptive right under the mortgage, though it might be void when executed. (*Pandrang Row and Abdur Rahman, JJ.*) ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. **1940 M.W.N. 404=51 L.W. 666.**

———*Construction—Inam Sanad—Grant of alienated village in inam together with all taxes and cesses present and future cesses, waters, trees, stones, mines, etc.—Trees on land occupied by khots, dharekaris and permanent trees prior to grant—Right to—Adverse possession by latter—Effect of.*

Where an inam sanad recites that an alienated village is granted to the grantee in inam together with all taxes and cesses, the present and future cesses, waters, trees, stones, mines and buried treasures, but exclusive of the rights of the hakdars and ancient inamdars, the grant is clearly a grant of the soil and includes in express terms the rights to trees, stones, mines, etc. The inamdar is therefore the owner of all timber trees which are in the lands in occupation of khots, dharekaris and permanent tenants which were in their occupation prior to the grant of the village to the inamdar. Where, however, it has proved that the khots, dharekaris and permanent tenants had, for a period of over thirty years been exercising the right of selling, cutting and removing the trees on their lands, constantly, openly, to the knowledge of the inamdar and without his permission and without protest from him, it must be held that the claim of the inamdar to the tree is barred by limitation and adverse possession. (*Wadia and Sen, JJ.*) PUTLAJI VISHRAM *v.* DAMODAR VISHNU. **184 I.C. 437=12 R.B. 174=41 Bom.L.R. 805=A.I.R. 1939 Bom. 405.**

———Construction—Nature of estate—Estate created for life of *B*—*B* given no right to transfer it except for necessity—On death of *B* without heirs property to go to plaintiff—Nature of *B's* estate—Restraint on alienation by *B*—Validity. *See* T. P. ACT, S. 10. **1937 A.W.R. 11=1937 A.L.J. 84.**

———*Construction—"On death of widow, daughter, or, failing her, next heirs if any, to inherit".*

The material portion of a grant ran as follows: "On the death of the last surviving widow, the daughter of the late Raja, or, failing her the next heirs of the late Raja, if any, will inherit the property".

Held, that no gift was expressed in favour of the daughter until the death of the last surviving widow and no right vested in her until she survived that period and the words "or failing her" meant failing her survivance at the death of the last surviving widow.

Held also, that "next heirs" meant nearest heirs at the time when the succession opened on the death of the last surviving widow. The daughter, on survivance, would come in as a named heir, and the preceding gift to her did not affect the legal order of succession denoted by the words "next heirs". (*Lord Thankerton.*) CHOTA RAJA SAHEB MOHITAI *v.* SUNDARAM AYYAR. **63 I.A. 633=59 Mad. 633=38 Bom.L.R. 672=63 C.L.J. 504=1936 M.W.N. 649=161 I.C. 888=43 L.W. 734=8 R.P.C. 222=1936 O.L.R. 227=1936 All. L.R. 413=1936 P.W.N. 390=40 C.W.N. 737=A.I.R. 1936 P.C. 131=71 M.L.J. 41 (P.C.).**

———*Construction—Right to minerals—Shrotriem grant to pious Mahomedans reserving jodi—Grantee's right to minerals—Burden of proof.*

Certain lands were granted by way of shrotriem to certain pious Mahomedans reserving a jodi. The original deed of grant was lost and was not produced. In 1790, the Collector wrote to the then shrotriemdar a letter asking him to pay a beriz of 130 pagodas into the Treasury in respect of the shrotriem, to obtain a receipt and happily enjoy the income (*phalam*) derived from the village certain extracts from the list of sanads were produced, referring to three grants in Persian made in 1760, 1769 and 1777. The inam register described the lands granted as consisting of 1647.41 acres of dry land, 112·50 acres of wet land, and 9·37 acres of garden land as well as 636·77 acres of poramboke land. The entry in the column containing the recommendation of the Deputy Collector was to the following effect: "The shrotriem being of an older date than 50 years can be confirmed. The shrotriemdars are willing to enfranchise. Quit rent 1|8th. Rupees 597 inclusive of jodi. In Mr. Traver's account of Fasli 1211 this shrotriem is entered as a grant only for the lives of the persons in column 14. All of them died about 30 years ago and the shrotriem continues to be uninterruptedly enjoyed by the persons in column 16. Mr. Travers seems to have entered so because the word 'hereditary' is not mentioned in the Parvanas. Under the present rules the title is perfectly valid as fifty years' undisturbed possession is proved." There was no word in the register about minerals and the assessment of land revenue was based entirely on the value of the agricultural land. The land was used entirely for the purpose of producing crops till about 1900, but in 1900, the grantees began to extract and work mica from the land.

Held, (1) that there was no grant of minerals to the grantee, and the fact that the Government agreed to treat the grant as being a hereditary

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grant could not in any way alter the nature of the original grant; (2) that the burden of proving that the original grant did pass the right to the minerals was upon the grantee who claimed the same; (3) that the fact that mica had been worked from the land from 1900 was no ground for presuming that the original grant permitted the same. (*Leach, C.J. and Lakshmana Rao, J.*) MAHARAJA OF VENKATAGIRI *v.* SECRETARY OF STATE. **182 I.C. 392=12 R.M. 70=1938 M.W. N. 409=47 L.W. 628=A.I.R. 1938 Mad. 734.**

———*Construction*—Saranjam—*Sanad—Grant of villages to grantee and his heirs from generation to generation—Provision for enjoyment in inam from generation to generation with rights of trees, water, stones, earth and minerals—If* saranjam—*If confers mere life estate or heritable and alienable estate.*

A grant or sanad of certain villages to the grantee and his heirs lineal and collateral from generation to generation, which recites that "the Ammals were granted including Kulbab Kulkanu and rights of trees, water, stones, earth and minerals, which rights were to be enjoyed in inam from generation to generation" and that the inam was to continue "so long as there shall remain in existence any male heir in the family of the grantee," cannot be held to be a *saranjam* grant such a grant is one conferring a heritable and alienable estate. It may be that the grant in the first instance was made for political or military services. But such grants are not necessarily of the nature of *saranjam* especially when there is nothing in the sanad to indicate that a mere life estate was intended, and when the indications are rather the other way. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839= 12 R.B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

———*Construction—Service emolument appertaining to office of Kazi—Liability to be sold in execution.*

Where a Sanad declares that a certain land shall be permanently continued as service emolument appertaining to the office of Kazi, such land is not liable to be sold in execution of a money decree against a *de facto* Kazi who is performing services as such. (*Broomfield and Macklin, JJ.*) SATTAPPA GURUSATTAPPA *v.* MAHOMED SAHEB. **60 Bom. 516=163 I.C. 305=9 R.B. 4=38 Bom. L.R. 221=A.I.R. 1936 Bom. 227.**

———*Construction—Service grant—Essentials of —Grant of land from generation to generation and expressing hope that grantee should wish for prosperity of donor—If absolute grant or service grant.*

In order that a grant may be a service grant, it is necessary that the service which is annexed to the grant must be of a specific character and the grantee so long as the service is capable of being rendered, under a legal obligation to render it. In execution of a decree against the judgment-debtor the fields which were granted to his ancestor by the Scindia Government were attached. It was stated in the sanad that the grantee being a person devoted to religion and a deserving person too and a family person, the grant was made to him in order to enable him to carry out the duties. It was also stated that the grantee should enjoy the land from generation to generation and wish and pray for prosperity of the administration of the donor. It was contended by the judgment-debtor that the lands were not liable to attachment as the grant thereof was made for rendering religious service.

Held, that, on a true construction of the sanad, the terms thereof did not impose any condition of service on the grantee so as to import to it a character of a service tenure. The expression "from generation to generation" conveyed grant of an absolute estate to the grantee. The words that the grantee should wish for the welfare of the administration of the grantor were so general and indefinite that it was impossible to spell out what particular kind of service was contemplated by the grantee. The words merely expressed a hope that the grantee should be grateful and wish for the good of the grantor and his State. The words could not be said to have any legal effect in restricting the plenary right of the grantee as a proprietor of the land. The grant therefore conveyed an absolute hereditary estate unfettered by any condition which imposed any legal liability on the grantee to perform any service. The land so granted was therefore liable to attachment in execution of a decree against the holder thereof. (*Stone, C.J. and Niyogi, J.*) RADHAKISAN *v.* BALAMBHAT. **I.L.R. (1938) Nag. 27=172 I.C. 924=10 R.N. 261=A.I.R. 1937 Nag. 248.**

———*Construction — Service grant — Resumability—Grant of office remunerated by share in income of lands or grant of land burdened with service—Nadgowda watan—Grant of office of gumasta hereditarily—Grantee given right to manage watan lands and to take one-fourth share of income—Effect of—Resumability.*

Grants of office to be remunerated by a share in the income of lands are always resumable unless the grantee can show that they have specially conditioned otherwise so as to prevent their resumability. The plaintiff claimed that his ancestors were the gumasthas of the Nadgowda watandars (ancestors of the descendants) and that under a grant or sanad made by the latter certain lands had been granted to his ancestors by the ancestors of the defendants for the gumasthagiri service performed in the past and to be performed in the future and he relied on three documents or sanads as the basis of his title. The first sanad of the year 1791, which was the original grant, recited that the father of the grantee had exerted himself very much for the grantor's watan and had rendered very great service and that therefore the watan of gumasta had been conferred on him, that the grantor would continue the post of watan gumasta to the grantee without break so long as the sun and the moon endure, and after referring to the fact that a separate sanad had been granted for one-half chavar land out of the inam lands to the grantee for the maintenance of the grantee's family, the sanad stated: "you should take accordingly and should take one-fourth having given us three-fourths after crediting the leasehold, share produce or cash, rent of all the inam lands.....we should continue hereditarily the gumasta watan which is bestowed on you by us with pleasure. No one of our descendants is entitled to take away the gumasthaship. You should be loyal and honest towards us, and should serve obediently by doing the par-

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gana service keeping in touch with Government and managing the watan." The second sanad of 1849, after referring to the half-share in the cash allowance, perquisites, etc., which had been given and to the gift of one and half chavar of land, and reciting that the grantee, after excluding these, was to give the grantor three-fourths share in the yield of the inam lands, and that the grantee should retain the remaining one-fourth, concluded by saying: "We will continue as above the gumasthaship to you hereditarily. None of our descendants will ever raise any objections." The third sanad which was of the year 1863 recited that the grantee was making vahiwat hereditarily and provided *inter alia*.."there remain 14 villages and inam lands assessed at Rs. 303-8-0. In these our share is three-fourths and your share for watan gumastaship is one-fourth and is with you in all the villages since long. According to this old custom, you should enjoy hereditarily. You should give us the income of our share year after year. We have no concern to let out the lands in the villagers directly and to collect the income. Yourself and your descendants should enjoy and give us our three-fourths share annually according to the letting value and you should take your one-fourth share. . . In the above manner, you should make vahiwat of the watan for all times till the sun and the moon endure. . . . . .

Held, on a construction of the documents, that the three sanads read together did not confer anything more than the office of gumasta and provide that the office was to be remunerated by a one-fourth share in the income of the watan lands, and as such was clearly resumable, there being no grant of land at all burdened with service. The grant being one of an office only would be resumable whether it was for past and future services or for future services only. (*Wadia, J.*) HANMANT *v.* GURUNATH. **40 Bom.L.R. 88=174 I.C. 809=10 R.B. 487=A.I.R. 1938 Bom. 188.**

———Construction—Sheri lands—Grant by Government to member of joint Hindu family—Grant *prima facie* in name of individual member and not for benefit of family—If joint family property or grantee's separate property. *See* HINDU LAW—JOINT FAMILY. **40 Bom.L.R. 118.**

———*Construction—Subsequent conduct of grantor—Agraharam—Open use of tank-bed by agraharamdars—Government not collecting assessment—Inference—Admission of grantee's title to tank-bed.*

Certain tanks situated in an agraharam ceased to be used for purpose of irrigation and the tank-beds were openly cultivated by the Agraharamdars. The Government collected cesses, but forbore from collecting assessment,

Held, that collecting cesses but forbearing to collect assessment almost amounted to an admission on Government's part of the Agraharamdar's title to the tank-beds whether the Government so intended it or not. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. **181 I.C. 688=11 R.M. 832=1938 M. W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193 =(1938) 2 M.L.J. 434.**

———*Construction—Taluqdari sanad—Kaiser Bagh house—Restriction as to transfer—Scope of —Intention of Government.*

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Where the sanad recited that the grantee should not transfer his share 'to any one not taluqdar of the heir to a taluqa', it only means that the grantee could transfer his share only to any one in his own position or to his own heir apparent or to the heir apparent of such other person. The intention of the Government was that these houses should go with Taluqa as an appurtenance thereof. The house should follow the Taluka. (*Hamilton and Yorke, JJ.*) RAZA HUSAIN KHAN *v.* SAIYID MAHOMED. **14 Luck. 22=1938 O.A. 353 =1938 O.W.N. 462=1938 O.L.R. 244=174 I.C. 993=10 R.O. 287=A.I.R. 1938 Oudh 175.**

———*Construction—Taluqdari sanad—'Taluqdar' and 'heir to taluqa'—Meaning of.*

In connection with sanads issued prior to the Oudh Estates Act, the word 'Taluqdar' ought to be understood only in the general sense in which it is commonly used to-day namely the owner of a taluqa, and the expression 'heir to a taluqa' means the heir apparent to such a person as was then regarded as taluqdar. (*Hamilton and Yorke, JJ.*) RAZA HUSAIN KHAN *v.* SAIYID MAHOMED. **14 Luck. 22=174 I.C. 993=1938 O.A. 353= 1938 O.W.N. 462=1938 O.L.R. 244=10 R.O. 287=A.I.R. 1938 Oudh 175.**

———*Construction—Two conflicting descriptions of subject-matter of grant—That which is more certain, stable and least likely to have been inserted inadvertently, must prevail.*

Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been inserted inadvertently, must prevail if it sufficiently identifies the subject-matter. Applying this rule to documents in which there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, it has been held that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity. But if the description of the boundaries is vague and uncertain, it yields to the description of the quantity. 37 Cal. 293 and 14 W.R. 5 (P.C.), Rel. on. (*Tek Chand, J.*) HANS RAJ *v.* BANARSI LAL. **175 I.C. 755=11 R.L. 56=A.I.R. 1937 Lah. 920.**

———*Construction—Watan service inam*—Gordon sanad—*If deals with right to soil or right to hold land free of full assessment of revenue—Inquiry under Bombay Rent-free Estates Act—Order resuming possession of lands—If* ultra vires—*Power of Government to resume possession—"In lineal succession from generation to generation"—If includes adopted son—Adoption by watandar without consent of Government or members of family—Validity.*

The ancestors of the plaintiff claimed to hold the lands in suit without payment of any assessment as *desgat watan.* The right of the family to act as *desai* in respect of the lands was to some extent recognised by the Mahomedan Kings of Bijapur, afterwards by the Government of Peshwas and ultimately by the East India Company. In 1845, *B*, the then head of the family claimed to be entitled to the lands and applied to have his name entered in the Government records. He died in 1851, and after his death, Government challenged the right of his son *B*, who was then a minor, and

his widow, *S* who was managing the properties, to the privileges claimed. In 1852 the villages were attached under the orders of the Government on the ground that they were not *desgat watan,* but were held as *jahagir* or on non-service tenure. An inquiry by the Inam Commissioner followed, and in 1858, Major Gordon, the Inam Commissioner decided that the villages could not be regarded as *desai watan* or in any light other than of Government villages continuable under the first proviso to R. 6 of Sch. B of the Bombay Rent-fee Estates (Inam) Act of 1852 during the time of the claimant, and that since the claimant had died, the lands should be at once resumed and assessed as khalsat. *B* appealed, but, the Government, without deciding the appeal, offered to *B* in 1864 that if he agreed, summary settlement in respect of the lands pertaining to his watan would be applicable to him on certain conditions to be laid down by Government. *B* having accepted the conditions, a sanad was issued to him *in* 1872, in the form known as the Gordon sanad, under the Gordon settlement applicable to District Hereditary Officers' watans. It mentioned that the lands and cash allowances entered in the Government Records hereditarily shall be continued in lineal succession from generation to generation on condition that the persons in enjoyment and their heirs shall be obedient to British Government and act faithfully and honestly and shall go on paying to Government permanently the judi mentioned therein. The amount of the judi was mentioned, and then followed a clause which was in these terms: "So long as there are male heirs, *i.e.,* direct or indirect of the watan or so long as any person adopted in the watandar family, the said lands and cash allowance shall be continued by Government without taking service and without demanding anything more than the above mentioned fixed amounts and without any objection or question as "to the rights of the persons in enjoyment". *B* adopted the plaintiff, who was his daughter's son in 1909, and he died in 1918. Subsequently the Government passed orders resuming possession of the lands and cash allowance. Plaintiff having sued and obtained a declaration that he was the validly adopted son of *B* in 1924 applied to the Collector to have his name entered as watandar, but the Collector refused to do so and in 1926, proceeded to confiscate the watan. Plaintiff having failed to get any redress from the Government ultimately brought a suit, claiming to be the watandar of the suit lands and of the cash allowance, and praying for a declaration that the order of the Government resuming possession of the properties was illegal and *ultra vires* and for consequential relief.

Held, (1) that the settlement arrived at between the Government and the inamdar was only as to the right to hold the lands free from full assessment, and that the settlement and the action of the Government preceding it had no reference to the right to occupy the soil, and consequently the sanad should also be construed as dealing only with the right to hold the lands free from full assessment and not as a grant of the right of the lands themselves; (2) that if either of the conditions of the grant, *i.e.,* of being faithful to Government, and of paying a fixed duty, the judi, were broken, the grant would terminate and Government be entitled to claim full assessment on the lands but that any right of occupation which the inamdar possessed apart from the sanad would remain untouched; (3) that the words "in lineal succession from generation to generation" should not be construed in their literal sense as meaning descent from father to son, but should be taken as equivalent to "continued to the owner and his heirs," because the conditions imposed were not upon lineal heirs but upon heirs generally; (4) that the plaintiff, as the adopted son of *B,* was clearly a lineal descendant of *B,* as under the Hindu Law an adopted son was, for all practical purposes, in exactly the same position as a natural born son and succeeded in lineal succession; (5) that in any case, even assuming that there was no male heir of the watan and also assuming that the sanad dealt with rights in the soil, the Government were not entitled to resume possession of the lands under the final clause, which was not a clause of re-entry, and that at the highest the Government, if there were no requisite heir to the watandar, were only entitled to insist on service or further assessment, and had no right to resume possession of the land; (6) that the adoption by the watandar without the consent of the Government or of the other members of the family was good as between himself and the other members of the family, though Government may not be bound to recognise the title of the adopted son to the watan; and (7) that the plaintiff was therefore entitled to the declaration that the orders of the Government resuming possession were illegal and *ultra vires* and could not be enforced against the plaintiff. (*Beaumont, C.J. and Wadia, J.*) RAMSOMAPPA *v.* SECRETARY OF STATE FOR INDIA. **172 I.C. 271 =10 R.B. 263=39 Bom.L.R. 851=A.I.R. 1937 Bom. 465.**

———*Crown grant—No term fixed—If an indication of permanency—Absence of heritability and transferability—Resumption—Right to—Time limit, if any.*

Where there was nothing in a Crown grant to show that the grant was to be a permanent one, the mere fact that no term is indicated does not make it a permanent grant. Where there is nothing in the terms of the grant to make it transferable, nor is there any provision that the grantee's heirs should hold it after him, and the grantee violates the terms by transferring it, the Government can resume it for a grant is resumable at any time by Government and no limit of time applies to Government. (*Bennet and Verma, JJ.*) GAYA PRASAD *v.* SECRETARY OF STATE. **181 I.C. 584=11 R.A. 587=1939 A.L.J. 164=1939 R.D. 155=1939 A.W.R. (H.C.) 155=A.I.R. 1939 All. 263.**

———*Crown land—Grant of land to daffadar by Revenue Divisional Officer—Cancellation by Collector—Validity of.*

Where a Revenue Divisional Officer made a grant of valuable Crown lands to the daffadar of his office, who was not a member of depressed classes, and the grant was set aside by the Collector under his revisional powers, that existed in 1925.

Held, the original grant must be considered to have been absolutely devoid of authority. The grant being adverse to the interests of the Govern-

ment, the Collector acted within the scope of the authority conferred on him by Board's Standing Orders No. 15 in cancelling the grant. (*Pandrang Row and Abdur Rahman, JJ.*) VENKATARATNAM *v.* SECRETARY OF STATE FOR INDIA. **1938 M.W.N. 65=177 I.C. 629=11 R.M. 360= A.I.R. 1938 Mad. 318=(1938) 1 M.L.J. 187.**

———*Duration—Permanent tenancy of watan lands—Death of grantor—Status of tenant—Acceptance of rent from latter—Effect of.*

A permanent tenancy of paragana watan lands ceases on the death of the grantor: the grantee thereafter becomes a tenant on sufferance or, on acceptance of rent from him, a tenant from year to year—not a permanent tenant. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. **178 I.C. 854=11 R.B. 198=40 Bom.L.R. 1015=A.I.R. 1938 Bom. 492.**

———Grantor's right to derogate from—Owner of land selling same with old tree—Right to cut branches overhanging his own adjacent plot—Right of vendee to prevent cutting—Easement. *See* EASEMENT—ACQUISITION. **47 L.W. 324.**

———Inam. *See also* GRANT—RELIGIOUS ENDOWMENT.

———*Inam—Alienability—Construction of sanad—Jat inam permanent to grantee, 'his sons, grandsons and great-grandsons and so on from generation to generation'—Confirmation by Inam Commissioner—Limitation to lineal male descendants of grantee—Effect.*

Where a sanad of 1779 granted certain lands as jat inam permanent to the grantee 'his sons, grandsons and great-grandsons and so on from generation to generation' and which was renewed by the Inam Commissioner in 1857, on the same terms 'so long as there shall remain in existence lineal male descendants in the male line of the grantee,' on a question whether such land was inalienable.

Held, that there was nothing in the tenure of the village to indicate that alienation was forbidden, and that the terms of the Inam Commissioner's renewal order, do not lay down any restriction as to the grantee's power of alienation but merely state the period during which the village would be allowed to be enjoyed as inam. (*Broomfield and Wadia, JJ.*) GAJANAN *v.* JANKIBAI. **39 Bom.L.R. 1304=174 I.C. 256=10 R.B. 436=A.I.R. 1938 Bom. 113.**

———*Inam—Channel coming into existence after inam grant—Ownership in bed—Presumption.*

In cases where a channel is shown to have come into existence after an inam grant, the presumption of ownership even in respect of the bed of the channel will be stronger in favour of the inamdar; but the Court will have to draw inferences as to the arrangement under which the channel, serving not merely the inam village but other villages above and below, is likely to have been constructed. (*Varadachariar, J.*) SECRETARY OF STATE *v.* NARAYANA AYYAR. **1937 M.W.N. 145=169 I.C. 597=10 R.M. 71=46 L.W. 748=A.I.R. 1937 Mad. 523=(1937) 2 M.L.J. 178.**

———*Inam—Irrigation channel—Bed of—Rights of inamdar and of Government.*

The inamdar must be held to have some interest in the bed of the channel, to the extent required to enable him to maintain it in an efficient condition as a source of irrigation for his lands. Further, even if his right to take water for irrigating the inam lands be put no higher than an easement, he would be entitled under S. 24, Easements Act, to do on the servient tenement (*i.e.,* the bed) all acts necessary to secure the full enjoyment of the easement, subject of course to the limitations indicated in that section. In like manner, the Government by reason of its interest in villages lower down, may be entitled to do certain acts on the bed of the channel within the inam limits, even if this portion of the bed should be held to be the property of the inamdar. Such acts whether done by the inamdar or by the Government cannot be said to amount to a trespass. The removal of the stones from the channel beds cannot by itself be said to 'damage' the servient heritage. It seems unjustifiable to impose on the inamdar the duty of giving notice to the Government officers before the inamdar could do what he is legally entitled to do, *viz.,* to clear silt or effect repairs to the channel within his limits. (*Varadachariar, J.*) SECRETARY OF STATE *v.* NARAYANA AYYAR. **1937 M.W.N. 145=169 I.C. 597=10 R.M. 71=46 L.W. 748=A.I.R. 1937 Mad. 523=(1937) 2 M.L.J. 178.**

———*Inam—Personal inam by Government—Estate not known to personal law of grantee—Creation of—Validity—Successive life estates or limited interests—Power to create.*

In the case of personal inams granted by the Government, the latter may create heritable estates not known to ordinary Hindu or Mahomedan Law; and when once created the terms of the grant have got to be enforced by Courts. It is open to the Government to create successive life-estates or limited interests and the prohibition as to alienation may be imposed by the Government either by virtue of an enactment or by a grant. To such case S. 60, C. P. Code, would apply and the property is not therefore liable to attachment and sale in execution of a decree against the holder. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) KHANI BEGAM SAHEBA *v.* KRISHNANANDAGIM BAVAJI. **17 Mys.L.J. 305= 44 Mys. H.C.R. 249.**

———*Inam—Pre-settlement inam within zamindari—Land forming single block in single ownership and bordered by natural stream—If riparian tenement—Right of zamindar to levy water-cess from inamdar—Origin of inam and stream unknown.*

A pre-settlement inam within the geographical limits of a Zamindari, consisting of a single block of land in a single ownership, part of which is wet and part dry, and bordered by a natural stream, the origin of the stream and the origin of the inam, both being unknown, must be presumed to be a riparian tenement. It has to be presumed that the grant of the land carried with it the right to utilise the water from the stream; and the fact that in the inam statement only a specified extent of it is mentioned as wet is no criterion for restricting the user to that extent. The zamindar consequently has no right to levy watercess from the inamdar. (*Venkataramana Rao, J.*) VENKATARATNAM *v.* MAHARAJAH OF PITTAPUR. **175 I.C. 889=11 R.M. 19=1937 M.W.N. 974=46 L.W. 512=A.I.R. 1938 Mad. 68.**

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———*Inam—Presumption from long enjoyment.*

Long enjoyment of inam tenure without question for seventy years raises a presumption that it had a lawful origin. (*Lord Roche.*) VINAYAK RAO *v.* SECRETARY OF STATE FOR INDIA. **1937 M.W.N. 619=3 B.R. 37=45 L.W. 739=1936 All.L.R. 855=1936 O.L.R. 569=38 Bom.L.R. 1265=64 C.L.J. 178=9 R.P. 112=164 I.C. 753 =A.I.R. 1936 P.C. 312=(1937) 1 M.L.J. 367 (P.C.).**

———*Inam—Resumability—Presumption as to—Rule—Pattamdar service inam—If resumable.*

Inam grants fall under three groups: (1) grants of land on favourable rent burdened with service; (2) grants made in consideration of past and future service; (3) grants of officers remunerated by an interest in land in lieu of wages. Grants falling under groups (1) and (2) are normally out and out grants not resumable by the grantor in the absence of a condition to that effect, and in any case the zamindar who seeks to dispossess persons who have been in possession for several generations has, in the first instance, to establish facts forming a basis for a *prima facie* inference that the grant is one which may be resumed. In the case of post-settlement personal service inams, there is a presumption, to start with, that the grantor has a right to resume and that it is incumbent upon the holder of the grant to rebut this presumption when once it is established that the grant is of this nature. As to pre-settlement inams, in the absence of clear evidence as to the nature of the grant the question as to the class or groups in which they fall is a matter on which there is no presumption either way. A Pattamdar service inam grant, which is a grant relating to a service involving the giving of assistance to the Revenue Subordinates of the zamindar, is presumed to be resumable in the absence of evidence to the contrary. (*Wadsworth, J.*) SANYASI NAIDU *v.* RAJA OF VIZIANAGARAM. **179 I.C. 524 =11 R.M. 597=(1938) M.W.N. 953=48 L.W. 458=A.I.R. 1938 Mad. 1006.**

———*Inam—Rights under—Extent of—Evidence—Grant by pre-British Government—Inam title-deed—Value of original grant as evidence.*

The law undoubtedly is that after cession of territory the only enforcible rights in respect of lands ceded, are those subsequently conferred by the Crown by express or implied agreement, or by legislation. The British Government were not bound to recognize the revenue free grants of the previous Governments, though in practice they did recognize them. But when the original sanad is produced and the inam title-deed does not curtail or limit the right conferred by its terms, the original grant remains the best evidence of what has been granted by the Crown as the result of the inam enquiry. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. **181 I.C. 688=11 R.M. 832 =1938 M.W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193=(1938) 2 M.L.J. 434.**

———Inam—Tope inam—Grant to person described as dharmakartha—Grant shown as dharmadayam subject to condition of tope being preserved and the produce applied to charity—Tope used for shelter of villagers' cattle and way-farers and produce distributed among villagers—Nature of grant—If public charitable trust. *See* C. P. CODE,

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S. 92. **1937 M.W.N. 1089=(1937) 2 M.L.J. 505.**

———*Inam—Wrong descent—Duty of Record of Rights Officer.*

When a Record of Rights Officer comes across an inam which has wrongly descended to the then holder, there is no objection to his making an entry regarding the defective title and forwarding it to the Deputy Commissioner for action. (*Roughton, F. C.*) MT. RENUKABAI, *In re.* **1938 N.L.J. 258.**

———*Jagir—Crown grant of—Sanad making estate impartible and inalienable—Grant by jagirdar to junior members in lieu of maintenance—Inalienability—If implied—Alienation by junior members—Alienee—If liable to be ejected by jagirdar.*

Where a jagir is granted by the Crown under a sanad with the incidents of impartibility and inalienability attached to it, the whole estate is inalienable. When part of it are granted by the holder to the junior members in lieu of their maintenance, the parts so granted to them also remain inalienable, though the junior members are not expressly debarred from alienating them. The terms of the grant creating the parent estate necessarily imply that the condition of inalienability operates throughout and an alienee from the junior members is therefore liable to be ejected at the instance of the jagirdar or the holder of the estate. The right of maintenance of the junior members is only a personal right which is incapable of assignment. (*Niyogi, J.*) MOHANLAL PARWAR *v.* BIJAYA SINGH JAGIRDAR. **20 N.L.J. 1.**

———*Jagir—Forms of grant.*

Ordinarily the Government grant jagirs in the form of assignment of land revenue but it may also take the form of cash allowance by the Government or the assignment of other dues recoverable by the Government as the recovery of the fines and recovery of the income of a garden. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS. **172 I.C. 426=10 R.L. 318=39 P.L. R. 434=A.I.R. 1937 Lah. 211.**

———*Lawful grant — Presumption — Ancient transaction—Binding nature—Legal necessity—Absence of evidence as to—Presumption of lawful grant.*

Per *Wort, J.* (*Rowland, J.*, contra) :—The presumption of a lawful origin in support of proprietary rights, long and quietly enjoyed is not a branch of the law of evidence but a presumption arising in law in the absence of evidence. Where a grant made by a person having limited powers of alienation is challenged after the lapse of several years as invalid on the ground of absence of legal necessity, if there are no facts established directly connected with the question of necessity, and the grantee or his successor does not adduce any evidence to support the claim that the grant was within the competence of the grantor, the Court would be entitled to assume that the grant was lawfully and not unlawfully made and that it was a grant for legal necessity. (*Wort and Rowland, JJ.*) DARBAR SAHEB *v.* BARE LAL KANDARP NATH SAH DEO. **162 I.C. 797=8 R.P. 567=17 Pat.L.T. 488=A.I.R. 1936 Pat. 275.**

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———*Lost grant—Acquisition of rights under—Proof required.*

In order to acquire a right by prescription or under a lost grant, it is necessary to show (1) that the origin of the right was legal, (2) that the right had been enjoyed openly, peaceably and uninterruptedly, and (3) that the right was valid and enforceable against all. (*Sulaiman, C.J., Bajpai and Ganga Nath, JJ.*) GAURI SHANKAR *v.* HEMANTA KUMARI DEBI. **58 All. 818=162 I.C. 512=8 R.A. 877=1936 A.W.R. 266=1936 A.L. J. 223=1936 All.L.R. 440=A.I.R. 1936 All. 301 (F.B.).**

———*Lost grant—Presumption in favour of inhabitants of a village—Whether can be raised.*

There can be no presumption of a lost grant in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a particular village. (*M.C. Ghose and Mukherjea, JJ.*) ASRABULLA *v.* KIAMATULLA HAJI CHOUDHURY. **I.L.R. (1937) 2 Cal. 86=171 I.C. 785 =10 R.C. 305=66 C.L.J. 284=41 C.W.N. 503 =A.I.R. 1937 Cal. 245.**

———*Lost grant—Presumption of*—Kavinera *or percentage of* melwaram *of villages in zamindari —Payment made to claimants for long time— —Absence of indication of service grant—Nature of right—Different rates adopted in different villages —If makes claim indefinite—Right to charge— —Suit for arrears—Limitation—Limitation Act, Arts.* 131 *and* 132.

Plaintiff sued different persons in possession of different portions of a zamindari for recovery of a sum of money representing arrears of *Kavinera,* alleging that more than 200 years ago, there was a grant by the then zamindar to the plaintiff's predecessor-in-title of certain inams in the zamindari and also of a hereditary right to receive a small fraction of the zamindar's melvaram in each village in the zamindari. The defendants pleaded that the payments, if any, were only in the nature of voluntary payments conditional on the performance of services, and were indefinite, that the claim was barred by limitation and that the right claimed could not be enforced in a Court of law. It was found that as early as 1810, plaintiff's predecessor claimed under a grant of 1690, which had been lost, that the officers concerned were satisfied with the explanation for non-production of the grant, that the accounts of the zamindari at least from 1832 clearly showed a practice on the part of the village officers, in preparing the village accounts, to make a deduction in respect of this *Kavinera,* before ascertaining the amounts to be remitted to the zamindar as his nett income, and that from 1894, the plaintiff's title had been asserted and established in various litigations.

Held, (1) that the only conclusion from the facts established was that it was in recognition of a hereditary right under a pre-existing, but subsequently lost, grant that the *mera* was being paid to the plaintiff's predecessor-in-title and afterwards to the plaintiff; (2) that since there was nothing to indicate that it was a service grant, the payment could not be treated as one in return for services to be rendered; (3) that the fact that different rates were adopted in different villages, did not, so long as there was no lack of uniformity so far as the rate for each village is concerned, make the payment an indefinite one or

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make it an insufficient basis for a claim for the ground of a lost grant; (4) that the liability to pay the *Mera* was not a personal liability but one *virtute tenurae,* and was in the nature of a charge, as the payment had to be made out of the profits of the Zemindari villages, and as long as any person continued to be in possession of a village out of whose melwaram the *mera* was payable, he was liable to pay it as a condition of his tenure as zamindar; (5) that a claim to a payment of the kind fell under Art. 131, Limitation Act, as a periodically recurring right, so far as the claim was for a money decree against the persons in possession of the *melwaram* interest; and (6) that the suit would be governed by Art. 132 if the plaintiff, who was entitled to a charge sought recovery of the amounts by sale of the particular property charged—the charge being available against each village in respect of the portion of the *mera* due from the *melwaram* of that village. (*Varadachariar and Pandrang Row, JJ.*) KRISHNIAH *v.* LODD GOVIND DOSS KRISHNA DOSS. **176 I.C. 247 =11 R.M. 75=46 L.W. 358=1937 M.W.N. 899 =A.I.R. 1938 Mad. 47.**

———*Lost grant—Presumption of—Loss of prerogative power of Crown to tax property.*

The law may presume the existence of a grant which has been lost where it is sought to disturb a person in the enjoyment of a right which he and his predecessors have immemorially enjoyed, but it cannot be so presumed that the Crown has by some lost grant deprived itself of the prerogative power to tax the property of its subjects (*e.g.,* no land revenue was charged for over 60 years). (*Lord Macmillan.*) KAMALA VAHOOJI *v.* COLLECTOR OF BOMBAY. **64 I.A. 334=I.L.R. (1937) Bom. 756=31 S.L.R. 665=169 I.C. 778 =41 C.W.N. 1194=46 L.W. 227=1937 O.L.R. 413=1937 A.L.R. 647=10 R.P.C. 54=1937 M.W.N. 939=3 B.R. 759=39 Bom.L.R. 1046 =66 C.L.J. 43=1937 P.W.N. 985=A.I.R. 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).**

———*Lost grant—Presumption of—When arises.*

It is clear that whether a lost grant is to be presumed from a given state of facts is a question of fact. A Court is not bound to presume a lost grant but it may do so. It is only in case of long possession under the claim of definite right that the question of presumption of a lost grant arises. (*Wort, J.*) MAHENDRA NATH SIKHAR *v.* BHABENDRA CHANDRA RAY. **167 I.C. 66=9 R.P. 376=3 B.R. 263=A.I.R. 1937 Pat. 53.**

———*Lost grant—Presumption of—When arises —Long possession accompanied by non-payment of rent—Effect of—Evidence of express grant of rent-free lands—Absence of evidence of identification of lands in possession as those comprised in grant—Presumption of lost grant—If arises.*

A presumption of lost grant of rent-free lands may be made under certain circumstances from the fact of long possession accompanied by non-payment of any rent. But when there is an express grant, no presumption of a lost grant can arise. When there is an express rent-free grant to the defendant's ancestors but he is unable to identify the lands in his possession as the lands comprised in that grant, he cannot rely on a presumption of lost grant. (*Wort and Agarwala, JJ.*) KAMESHWAR SINGH BAHADUR *v.* SAKHWAT

ALI. 167 I.C. 238=9 R.P. 396=3 B.R. 283=17 Pat.L.T. 819=A.I.R. 1937 Pat. 96.

———*Lost grant—Presumption, when arises—Right to irrigate plot by cutting channel across public pathway—Lost grant, if can be presumed—Entry in C. S. records recording irrigation rights in respect of plot—Value of—Distinction between public and village pathway.*

No presumption of a lost grant is possible when the circumstances are such that no lawful grant could be made. A right to irrigate a plot from a tank by cutting a channel across a public pathway amounts to an infraction of the rights of the public, and no presumption of its legal origin could be made. There can, therefore, be no presumption of a lost grant in such a case. An entry in the C. S. records recording irrigation rights in respect of the plot in question, cannot by itself give rise to a presumption that the grant of the irrigation rights was anterior to the commencement of the pathway. Where, however, the pathway is not a public pathway but a village pathway, the rights to which are vested in the villagers only, no question of injury to public rights would arise by obstruction of the same. A presumption of a lost grant can, therefore, arise in respect of a right to take water by cutting a channel along a village pathway. (*Mukherjea, J.*) JATINDRA NATH MULLICK *v.* SATYA KINKAR SAIN. **42 C.W.N. 445=177 I.C. 53=11 R.C. 199 (2)=A.I.R. 1938 Cal. 366.**

———*Lost grant—Presumption of—When can be invoked—Right to use water from a particular source for all times.*

The theory of a lost grant cannot be invoked, where the grant sought to be relied upon is one which is not likely at all to have been granted, and when it is clear that there was no grant at least 50 years ago. Where the policy of the Government is well known to be to preserve unfettered their discretion in the matter of distribution of water or regulating its supply, it is most unlikely that any grant would have been made under due authority of the right to use water from a particular source for all time without reserving power to the Govenment to make a change later on. A lost grant can only be presumed, if at all, as a matter of fact when all the circumstances go to show that there must have been such a grant, and not where the circumstances show that there could not have been such a grant. (*Pandrang Row, and Abdur Rahman, JJ.*) NARAYANASWAMI PILLAI *v.* SECRETARY OF STATE. **180 I.C. 671=11 R.M. 741=47 L.W. 199=1938 M.W.N. 97=A.I.R. 1938 Mad. 400.**

———Nature of—Grant of land revenue of share of Zemindari owned by a family—Grant for maintenance of family from generation to generation—Transferability. *See* CROWN GRANTS ACT, S. 2. **1937 A.L.J. 567.**

———*Occupancy holding becoming a grove—Effect of—Disappearance of grove—Grove-holder's status—Transferee of grove plot—Position and rights of.*

Occupancy rights lapse in any plot of an occupancy holding which becomes a grove: the occupancy rights therein are superseded by grove rights. When the grove disappears, the grove-holder becomes a non-occupancy tenant in the plot; the former occupancy rights are not revived therein. The transferee of a grove plot forming a part of an occupancy holding, acquires grove rights, but they are extinguished when the grove disappears. He then becomes merely a sub-tenant or trespasser or at best a non-occupancy tenant. Though the original occupancy tenant might have managed to retain his occupancy rights in such land, that would not entitle his transferee to attempt to establish a claim to the same rights. (*Darling, S. M.*) BANWARI LAL *v.* ABID HUSAIN. **1938 A.W.R. 37 (B.R.).**

———*Presumption — Zamindari — Irrigation tank within boundaries of zamindari—Tank not communal property—Government not exercising ownership for over a century—If to be presumed excluded from zamindari settlement—Ownership of tank.*

A tank within the boundaries of a zamindari, which is not communal property but which is an irrigation tank cannot be held to belong to the Government merely because it is referred to in the Survey and Settlement Register as "poramboke", or that it is described as a village tank or that it has not been taken into account in fixing the assessment payable by the zamindar. Where it is shown that the Government during a period of over a century never exercised any acts of ownership over the tank in question, it must be held to belong to the zamindar and not to the Government. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VENKATARATNAM *v.* SECRETARY OF STATE. **182 I.C. 957=12 R.M. 193=1938 M.W.N. 305=47 L.W. 425=A.I.R. 1938 Mad. 565=(1938) 2 M.L.J. 452.**

———*Re-grant—Confiscation and re-grant by Government—Proprietors, if bound by intermediate acts of Government.*

Government during Mutiny of 1857 attached certain private properties under "General Order". The attached property was leased out on a nominal rent for building purposes for the construction of a proposed bazar for the convenience of the military camp. The lease was on the assurance, that in all likelihood the bazar would remain there for ever. It was also provided that if perchance the bazar was removed from there, the lessee would be competent to remove materials. Further the lessee could sell the shop subject to his "giving information" to the Government. The only conditions on which the lessee could be dispossessed were misconduct of lessee and in case land was required by Government for roads. The attached property was subsequently released to the former proprietors, who proved their innocence.

Held, that though the proclamation did not say in so many words that the lease was permasent, the terms clearly indicated that the grantees were permanent tenants.

Held, further, that the attachment before leasing was nothing less than appropriation of such property by Government, who was the *de jure* as well as the *de facto* owner at the time when, after the restoration of peace, as an act of grace, it decided to 'release' the property; the releases were re-grants conferring only those rights as were held by the Government, their assignor, and therefore the proprietors were bound by all the intermediate acts (leases of

the attached property for the bazar) of the Government in respect of the property assigned. (*Tek Chand and Dalip Singh, JJ.*) HAFIZ MAHOMED SULEMAN *v.* HARI RAM. **176 I.C. 65=11 R.L. 151=39 P.L.R. 602=A.I.R. 1937 Lah. 370.**

———Re-grant—Incidents of—If revests to original status—Government purchasing at sale for arrears of revenue—Subsequent restoration of estate to owner. *See* HINDU LAW—IMPARTIBLE ESTATE. **A.I.R. 1937 All. 377.**

———*Re-grant by Government after confiscation—Private property seized by Government after the Mutiny—Subsequent restoration to original owners—Permanent tenancies created by Government after seizure—Effect on—Act X of* 1858.

The attachment of the private property of the inhabitants of Delhi and its neighbourhood in 1857 and 1858 was nothing less than appropriation by the British Government who became the *de jure* as well as *de facto* owner thereof, and the subsequent restoration of the seized property to the original owners was a re-grant to them on certain conditions, and conferred a new title on them. The provisions of Act X of 1858 have no bearing upon the attachment. If, therefore, after the seizure and before the re-grant the Government had created permanent tenancies on the land, the re-grant was subject to such tenancies. (*Tek Chand and Dalip Singh, JJ.*) MT. NAZIR-UL-NISA *v.* MAHOMED ISHAQ. **I.L.R. (1940) Lah. 352=188 I.C. 372=12 R.L. 522=42 P.L.R. 61=A.I.R. 1940 Lah. 100.**

———*Religious endowment—Inam lands—Grant by Native Ruler to village temple for Nitya Naivedyam and Deeparadhana—Grant to enure so long as temple exists—Worship of Vishnu—Temple ceasing to exist—Building of new temple for worship of Vishnu under different name—Inam commission—Grant not resumed but continued and confirmed for new temple—Title to inam land—Right of new temple and idol—Right of Archakas.*

The principle of the legal personality of an idol and of the vesting of property in such personality cannot be taken literally. The endowments of a temple are not vested in the trustees, but are only managed by them. Where an inam is granted by the then sovereign authority (Native Raja) for the conduct of Nitya Naivedya and Deeparadhana in a Vishnu temple then existing in the village, the grant in substance is one intended to afford facilities to the residents of the village to carry on the worship of Vishnu there. If the inam under the term, of the grant is to enure only so long as the temple exists, it is open to the State to resume the inam when the inam ceases to exist. But where the temple and the original deity cease to exist, and a new temple is built and the worship of Vishnu (under a different name) is carried on there, and a subsequent inam commission enquiry does not think fit to resume the grant, but allows it to be used for the conduct of the worship in the newly built temple and confirms the inam, it cannot be held that the disappearance of the particular image from the temple has the effect of disannexing the inam from the existing temple though worship continues to be carried on for the benefit of the villagers. The new

temple must be held entitled to the inam in question, and as such the Archakas who are enjoying the inams as being attached to the temple cannot claim title to the same adversely to the temple. (*Cornish and Varadachariar, JJ.*) BOARD OF COMMISSIONERS FOR THE HINDU RELIGIOUS ENDOWMENTS, MADRAS *v.* VEERARAGHAVACHARLU. **177 I.C. 321=11 R.M. 309=46 L.W. 668=1937 M.W.N. 708=A.I.R. 1937 Mad. 750=(1937) 2 M.L.J. 368.**

———*Religious endowment—Inam lands of temple—Archakas having no separate salary or wages for Nitya Naivedyam and Deeparadhana—Inam register describing grantee as idol in some cases and grant as for worship of deity—Coupling of name of Archaka with that of deity in column showing present owner—Reference to performance of worship or service—Significance of—Grant—If to deity or to Archakas burdened with service.*

Where the Inam Register and the Inam Settlement mention the deity of a temple as the "present enjoyer" of the properties and describe the deity as the grantee, mentioning the grant of lands to be for "the wordship of the idol in the pagoda", and the lands are entered in the name of the deity, the grants must be held to be made to the deity and not to the Archakas, though the latter have to perform a dual duty in connection with the "Nitya Naivedya Deeparadhana," by supplying the materials necessary and by performing the necessary services, and although they had no separate remuneration by way of wages or salary fixed for them. The fact that the revenue authorities in some cases recommend the grant "to be confirmed" and in other cases "to be confirmed and continued so long as the service or worship is regularly performed," cannot lead to the conclusion that the grant is to the archakas burdened with service or that the grant is annexed to the office of Archakas. Nor will the fact that the name of the archaka or worship is coupled with that of the deity in the column "present owner" in the inam register show that the grant is to the Archaka burdened with service. (*Venkatasubba Rao and Cornish, JJ.*) PRESIDENT OF THE BOARD OF COMMISSIONERS FOR H.R.E., MADRAS *v.* KOTESWARA RAO. **176 I.C. 423=11 R.M. 85=1937 M.W.N. 1032=46 L.W. 587=A.I.R. 1937 Mad. 852=(1937) 2 M.L.J. 413.**

———*Religious endowment—Perpetuities, rule against—Gift to idol—Permanent grant of money to be paid out of income of property—Validity.*

The English rule of law which prohibits creation of perpetuities cannot possibly apply to gifts to idols in this country or to permanent grants of money to be paid out of income of properties for the maintenance and worship of deities which must in the nature of things be permanent grants passing from generation to generation. (*Guha and Mitter, JJ.*) SRISH CHANDRA *v.* RAKHALANANDA. **65 C.L.J. 520 =41 C.W.N. 1103.**

———Saranjan — Chillar fund—Administration of—Suit by Saranjamdar to recover from Government—Arrears of ain chillar deducted out of revenue payable to him. *See* BOMBAY REVENUE JURISDICTION ACT (X OF 1876) SS. 4

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(*f*) AND 5 (*a*). **38 Bom.L.R. 1339=A.I.R. 1937 Bom. 109.**

———*Saranjam—Practice of saranjam.*

The practice of the Saranjam is the best index of the meaning of the grant. (*Broomfield and Tyabji, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* NARAYAN RAO. **168 I.C. 357=38 Bom.L.R. 1339=9 R.B. 367=A.I.R. 1937 Bom. 109.**

———*Service grant—Desabandam main grant burdened with service—Alienability—Grant to Hindu family—Mortgage by father—Decree and sale in execution—Sons—If bound.*

Lands granted by way of desabandam inam burdened with a service, namely, keeping an irrigation tank in repair, are not alienable. An alienation of such inam lands is opposed to public policy and void. If a Hindu father executes a mortgage of such inam lands it cannot bind his sons, and a decree obtained on the basis of such a mortgage as well as an execution sale, being a nullity, must be disregarded. (*Pandrang Row and Abdur Rahman, JJ.*) LAKSHMADU *v.* RAMUDU. **I.L.R. (1940) Mad. 123=187 I.C. 816=12 R.M. 750=50 L.W. 472=1939 M.W.N. 918=A.I.R. 1939 Mad. 867.**

———*Service grant—Ejectment suit—Plea of adverse possession—Onus of proof—Performance of service in the past—If plaintiff bound to prove—Non-performance of service for over two years—Effect—Notice to quit—Necessity before suit.*

Where a grant is found to be a service tenure, a plaintiff suing in ejectment is not required to prove anything else. He need not prove that he had actually received service in the past from the defendant. The burden is on the defendant to prove that he, having been allowed to hold the land as a service tenure, had the right to hold the land adversely to the plaintiff in his independent right. If the grantee refuses to perform the services, he is liable to ejectment without any notice to quit. The mere fact that no service has been rendered to the grantor by the grantee for over 12 years before suit is not sufficient to show that the grantee or his successors have held the tenure adversely to the grantor from the time when the services were last rendered. (*Manohar Lall, J.*) HARISHANKAR *v.* CHANDU. **5 B.R. 861=183 I.C. 80=12 R.P. 98=1939 P.W.N. 99=A.I.R. 1939 Pat. 362.**

———Service grant—Essentials of *See* GRANT—CONSTRUCTION. **A.I.R. 1937 Nag. 248.**

———Service grant—*Kavinera*—Nature of. *See* GRANT—LOST GRANT. **46 L.W. 358.**

———*Service grant—Resumability — Karnams rendering private service to zamindar for long time—Inference—Right to resume.*

Where it is found that for a long time the Karnams were rendering private service to the zamindar, from this and from other circumstances an inference could be drawn that the lands granted to them by the zamindar were granted only for doing such service and the zamindar is entitled to dispense with the services and resume the lands. (*Venkataramana Rao, J.*) CHAKRAPANI RAO *v.* VENKATADRI APPA RAO. **173 I.C. 307=10 R.M. 555=1937 M.W.N. 189=A.I.R. 1937 Mad. 303.**

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———*Service grant—Village goldsmith service inam and kundanam service inam granted before permanent settlement—Resumability.*

The grants of land made for village service prior to the permanent settlement would never have been included in the mal assets of the zamindari at the time of the permanent settlement and the Government have every right to resume the inams granted for such purposes while the zamindar has no such right. The economic theory on which these villages were constituted or established in the past was that all the necessary amenities for communal life in the village should be available in the village itself. Even if there were services not directly connected with agricultural operations, they were nevertheless regarded as necessary village services, necessary in the sense that the villagers could not live their lives in the absence of persons who could render them such services in the village itself. Hence it is that the village purohit, blacksmith, washerman, snake charmer and so on were regarded as village servants or servants of the community performing services which were necessary for the welfare and continuance of the village community. It is well known that the village goldsmith is a village servant and that in many villages there are goldsmith's service inams. Kundanam service is hardly distinguishable from goldsmith's service, the former service merely demanding more skill in the art than the latter. These inams therefore must be taken to have been granted for village service and not for purely personal and private services to the zamindar. Such inams if granted before settlement are resumable by the Government. (*Pandrang Row and Horwill, JJ.*) VENKATAKUMARA MAHIPATHI SURYA RAO *v.* SECRETARY OF STATE. **182 I.C. 897=12 R.M. 211=A.I.R. 1938 Mad. 445.**

———*Service inam—Resumability—Burden of proof—Grantee spending money over improvements and converting dry lands into wet—Enjoyment of that land since* 1871*—Absence of resumption for default in service—Inference.*

In the case of service inam, the question as to whether there is a presumption that it can be resumed is not important and the primary burden is on the zamindar to prove that the land is resumable. But where the tenant converts the dry land into wet land by spending money for its improvement and has been enjoying the land ever since 1871 and even when default is committed in rendering the service, only the property is sought to be attached and no attempt is made to resume it, these circumstances strongly support the view that the land is not resumable. (*Madhavan Nair and Stodart, JJ.*) SOBHANADRE APPARAO BAHADUR *v.* RAMUDU. **168 I.C. 498=9 R.M. 596=1936 M.W.N. 418=A.I.R. 1936 Mad. 831.**

———*Service inam—Temple service inam lands—Alienability—Mortgage—Validity.*

In case of temple service inams, public policy requires that the property should as far as possible be kept out of the reach of the creditors of the holder of the inam to secure the due performance of the service in which the public are interested. A mortgage of the property would *prima facie* be detrimental to the interests

of the temple. The fact that the Court may choose to appoint a receiver in particular cases cannot be taken into account in testing the validity of the mortgage. (*Venkataramana Rao, J.*) V.E. RAMANATHAN CHETTIAR *v.* KALIDASA KAVANDAN. **163 I.C. 724=9 R.M. 56=44 L.W. 505=1936 M.W.N. 982=A.I.R. 1936 Mad. 559=71 M.L.J. 398.**

———*Transfer—Prohibition in the* wazib-ul-arz *—Transfer in spite of—If illegal—Rights of vendee.*

Where there is a transfer of a grove to a co-sharer, in spite of a prohibition against such a transfer contained in the *wajib-ul-arz*, it is not illegal as not being contrary to law. But the vendee does not thereby become full proprietor of the grove as he is not the sole Zamindar. He is only entitled to remain a grove-holder. The effect would be that on a partition of the village, only that part which represents his share in the whole area of tenant's groves will be included in his *path*. (*Darling, S.M. and Bomford, J.M.*) BRINDABAN *v.* CHANDRA SHEKHAR. **1938 R.D. 10=1938 A.W.R. 9 (B.R.).**

———*Validity of—Tenure-holder holding at variable rent—Grant of under-tenure to another at fixed rent in perpetuity—Validity—Arrears of rent due by tenure-holder—Sale of tenure in execution of decree for tenure—Purchase by* patnidar *holding superior interest under proprietor—Effect—If bound by contract of fixity of rent of under-tenure.*

No person can grant to another something more than he himself has. A grant at a fixed rent is something more in quality than a grant at a rent which is liable to enhancement. When a tenure-holder under a proprietor holding at a variable rent cannot therefore validly create an under-tenure at a fixed rent, because he would be granting something greater than the grantor himself possessed. If a person holding at a rent variable and liable to enhancement creates an under-tenure at a rent fixed for perpetuity, the fixity of rent in the under-tenure cannot bind the grantor's landlord. A *patnidar* who claims directly under such a landlord and whose rights are superior to those of the grantor tenure-holder cannot be bound by the grant either. When the *patnidar* puts up the tenure of the grantor tenure-holder to sale in execution of a rent decree and purchases it himself, he gets the tenure as it is and not merely the right, title and interest of the defaulting judgment-debtor, and by no stretch of imagination can he be held to be the representative of the judgment-debtor. It may be that he may not be able to avoid all the acts and transactions of the judgment-debtor-tenure-holder, but he nevertheless gets the tenure, and is entitled, under the general law of the land, to get the rent payable by the judgment-debtor's under-tenant enhanced subject to such limitations as the law provides. (*Wort and Khaja Mohammad Noor, JJ.*) CHANDRA MOHAN MAJHI *v.* MIDNAPORE ZAMINDARI CO., LTD. **20 Pat.L.T. 185.**

———*Watan—Resumption by Government—Effect of.*

On a resumption of a watan grant by Government, the estate is not extinguished. The effect of the resumption is no more than that the Government levies the full assessment, and the right to hold free of assessment or at a reduced assessment is lost. (*Broomfield and Macklin, JJ.*) DUNDOOBAI *v.* VITHALRAO. **60 Bom. 498=162 I.C. 780=8 R.B. 422=38 Bom.L.R. 193=A.I.R. 1936 Bom. 182..**

GRATUITY—Book debts—Difference. *See* T. P. ACT, S. 6 (A). **1938 Rang.L.R. 542.**

GROVE. *See also* LANDLORD AND TENANT—GROVE.

———*Grant for purposes of—Ownership in trees to be with landlord—No term as to re-entry—Court sale—Landlord if entitled to re-entry.*

Where a particular land was granted for starting a grove on condition that the ownership in the trees was to remain in the landlord and that the grantee should have no power of sale or mortgage, but there was no provision for re-entry, and where after the death of the grantee, it is sold in execution of a decree against the son of the grantee and it is acquiesced in by him, it amounts to an abandonment and the landlord can re-enter. (*Hamilton, J.*) MAHOMED SAADAT ALI KHAN *v.* MAHOMED AMIR AHMAD. **14 Luck. 459=11 R.O. 258=180 I.C. 765=1939 O.A. 321=1939 O.W.N. 333=1939 O.L.R. 204=A.I.R. 1939 Oudh 158.**

———*Loss of character of grove—Inference—Circumstances.*

Where the trees in a grove are all in a corner and the major portion from which they have disappeared is susceptible of being put to any other use, the area has lost its character of grove. (*Marsh, S.M. and Mehta, J.M.*) SURAJ BIKRAM SINGH *v.* DIN BANDHU. **1939 R.D. 322=1939 A.W.R. (B.R.) 284.**

———*Miscellaneous trees—If self sown—Presumption.*

Miscellaneous trees like the jamun, neem, babul and khajoor trees must be presumed to be self-sown, unless there is evidence that they were planted by the groveholder. It is impossible for a landlord to prove a negative, that is to prove that such trees were not planted; as a rule they are of spontaneous growth, and it is for the groveholder, who asserts that they were planted, to prove his assertion. (*Drake Brockman, S.M. and Knox, J.M.*) KAILASH BIHARI LAL *v.* MUKTA PRASAD. **1937 R.D. 599.**

———*Planted by zamindar—Rights in—Grove, if can be exempted on a sale of a portion of zamindari.*

If a zamindar plants a grove in the village in which he is a zamindar, that grove appertains to his share in the zamindari. If he elects to sell part of his zamindari holding and retain his entire share in the grove land, that entire share would continue to appertain to his remaining share in the village. (*Thom, C.J. and Ganga Nath, J.*) RAJ NARAIN DUBE *v.* IMAM RAZA. **1940 A.W.R. (H.C.) 451=1940 O.A. 685=1940 A.L.J. 587=A.I.R. 1940 A. 457.**

———*Planting of, by occupancy tenant—Sale in execution of money decree—What passes to auction-purchaser.*

Where in the execution proceedings of a simple money decree there is an auction sale of the trees of a grove planted by an occupancy tenant, the purchaser can only acquire the rights in the timber of the trees. The purchaser is not entitled to claim to hold it as grove land as long as the

trees remained, on the ground that the nature of the tenancy was changed by the planting of the grove and therefore the trees became transferable. (*Bennet and Verma, JJ.*) LACHMAN SINGH *v.* MULWA. **181 I.C. 397=11 R.A. 562=1939 R. D. 110=1939 A.L.J. 209=1939 A.W.R. (H.C.) 119=A.I.R. 1939 All. 224.**

———*Replacing of fallen trees—Groveholder if possesses right — Custom*—Wajib-ul-arz—*Interpretation.*

The right to replace fallen trees is part of the common law rights of a groveholder. Where according to the *wajib-ul-arz* containing the record of custom about groves a tenant is stated to be not entitled to replant if all the trees fall down, it only means that once the grove character is destroyed, it cannot be re-established by planting trees but that if it is retained casual fallings can be replaced but total destruction cannot be remedied. (*Darling, S.M. and Mehta, J.M.*) HAMID HUSAIN *v.* TULSA KUER. **1938 R.D. 886.**

———*Transfer of proprietary rights in* sir *land —Trees and fruit—Right to—If passes to the transferee.*

Per *Full Bench*: *Iqbal Ahmad, J., contra.*— On the transfer of proprietary rights in *sir* land on which a grove stands, the right to the possession of the trees and their fruits remain with the transferor, unless he relinquishes this portion of his ex-proprietary rights, or the whole of his ex-proprietary rights in accordance with S. 15, Agra Tenancy Act. (*Bennet, Iqbal Ahmad and Allsop, JJ.*) FITRAT HUSAIN *v.* LIAQAT ALI. **I.L.R. (1939) All. 518=181 I.C. 561=11 R.A. 576= 1939 O.L.R. 323=1939 A.L.J. 281=1939 A.W.R. (H.C.) 278=1939 R.D. 189=A.I.R. 1939 All. 291 (F.B.).**

———*When ceases to be one—Tests.*

Though the fact that a major portion of the land in question had been brought under cultivation, may not by itself be sufficient to enable a Court to hold that a grove had lost its character as a grove, yet where the number of trees on such land is disproportionately small to the extent of the area, it is impossible to hold that the land had not lost its character. The planting of new trees could not affect the question. (*Thomas, C.J.*) CHANDRA BHAN SINGH *v.* HUBBA. **14 Luck. 269=178 I.C. 882=11 R.O. 126=1938 O.L.R. 520=1938 A.W.R. (C.C.) 133=1938 O.W.N. 1211=1938 O.A. 966=1938 R.D. 922=A.I.R. 1939 Oudh 48.**

GUARANTEE. *See* CONTRACT ACT, Ss. 128, 129,

———Contract of—Construction. *See* CONTRACT —CONSTRUCTION. **(1937) 1 M.L.J. 143.**

———Contract of—Requisites of—If can be implied—Writing if necessary. *See* CONTRACT—GUARANTEE. **A.I.R. 1937 Sind 50.**

———Person entrusted with money for investment on landed property lending on promissory notes in his own name—Subsequent endorsement of notes to owner of money promising to take executant to the indorsee and clear the loan—If guarantee. *See* NEGOTIABLE INSTRUMENTS ACT, S. 35. **(1939) 1 M.L.J. 897.**

GUARDIAN AND WARD.

See (1) GUARDIANS AND WARDS ACT.
(2) HINDU LAW.
(3) MAHOMEDAN LAW.
(4) MINORS.

———*Alienation by natural guardian—Validity.*

An alienation by a natural guardian of a minor which is not proved to be for legal necessity or for his benefit, is not binding upon the minor. (*Kichlu, J.*). GAMOON *v.* DEVI DAS. **39 P.L.R. J. & K. 125.**

———*Debt by guardian—"Benefit of estate"— Money borrowed to improve business inherited by minor.*

Where the income from a business inherited by a minor is the principal source of his maintenance, money borrowed by his guardian for the efficient conduct of that business is money borrowed for the benefit of the minor's estate. (*Khundkar and Lodge, JJ.*) ANIL KUMAR DAS *v.* PROBHABATI MITRA. **44 C.W.N. 1048=A.I.R. 1940 Cal. 532.**

———Debt incurred by mother—Creditor's rights —Subrogation—Nature and extent of. *See* MINOR—DEBT INCURRED BY MOTHER. **1938 M.W. N. 103=(1938) 1 M.L.J. 181.**

———Dual guardianship—More than one person, if can be lawful guardian of the same minor. *See* PENAL CODE, S. 361. **15 Pat. 817.**

———Maintenance—Arrears of—Order issuing warrant against ex-guardian—Legality. *See* GUARDIANS AND WARDS ACT, S. 34. **68 C.L.J. 68.**

———*Transfer by guardian—Remedy of ward— Suit to set aside—If essential—Repudiation— What amounts to.*

A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation. (*Wort and Manohar Lall, JJ.*) JAGDAMBA PRASAD *v.* ANADI NATH. **17 Pat. 460=176 I.C. 273=19 Pat.L.T. 594=4 B.R. 697=11 R.P. 59=1938 P.W.N. 951 =A.I.R. 1938 Pat. 337.**

GUARDIANS AND WARDS ACT (VIII OF 1890)—*Co-parcenery property—Appointment of guardian for minor member.*

It is well settled that the manager of a joint Hindu family is regarded as guardian of the interest in the coparcenary property of all the minor members of the family and therefore no certificated guardian can be appointed for such minors. (*Srivastava and Nanavutty, JJ.*) RAJA RAM *v.* RAMESHWAR BAKSH SINGH. **12 Luck. 109=161 I.C. 605=8 R.O. 335=1936 O.W.N. 354=1936 O.L.R. 194=A.I.R. 1936 Oudh 270.**

———*Jurisdiction of Court under—Consent order for payment of money by husband to wife or school authorities for maintenance and school expenses of minor children—Validity—Executability as decree for money—C. P. Code, O.* 21, *R.* 11.

In proceedings between a husband and wife under the Guardians and Wards Act, a consent order was made by the Court as to custody and maintenance of the minor children of the marriage, which provided, *inter alia*, that the husband was to pay all the expenses of the maintenance and schooling of all the said minors, and that the

wife or the school authorities, as the case might be, should receive the money sent by him from time to time for the said purpose and forward to him proper receipts and vouchers therefor. The wife took out a summons for leave to execute the said consent order under O. 21, R. 11, C. P. Code, whereupon the husband contended that the order was made without jurisdiction and that it was not executable as a decree or an order.

Held, (1) that though the order did not fall within the terms of the Guardians and Wards Act, which does not confer on the Court any power to order a parent, or any body else to pay the school bills of his minor children, the parties were properly before the Court in a matter under the Guardians and Wards Act, and were justified in consenting to the Court making the order which was within the general competence of the Court to make, and the order was a valid order; (2) that the order, however, was not a decree for payment of money to the decree-holder, the wife, because a part and possibly the whole amount might be paid to third parties; and a decree in that form cannot be regarded as a decree for payment of money which can be executed as such under O. 21, R. 11, C. P. Code. (*Beaumont, C.J. and Wadia, J.*) NARIMAN *v.* PIROJBAI. **185 I.C. 56=12 R.B. 219=41 Bom.L.R. 625=A.I.R. 1939 Bom. 367.**

———*Powers of Court—Money due to ex-guardian—Power of Court to issue distress warrant on ex-minor.*

There is no provision in the Guardians and Wards Act empowering the Court to issue a distress warrant on the minor to recover from him sum alleged to be due by him to the ex-guardian. (*B. K. Mukherjea, J.*) MD. IBRAHIM *v.* MD. ABDUL BASHAR. **173 I.C. 229=10 R.C. 491=A.I.R. 1937 Cal. 422.**

———**Ss. 4 (2) and 41 (3)**—*Guardian—If includes a* de facto *guardian—Power to order* de facto *guardian to deliver property in his possession.*

A *de facto* guardian is a 'guardian' within the meaning of S. 4 (2) of the Guardian and Wards Act and on his removal or discharge the Court has power under S. 41 (3) to require him to deliver any property in his possession or control belonging to the ward. (*Niyogi, J.*) ABAJI *v.* DAMODAR ABAJI. **1938 N.L.J. 202=176 I.C. 693 =11 R.N. 68=A.I.R. 1938 Nag. 399.**

———**S. 4 (5) (b) (ii)**—"For the time being ordinarily resides"—Interpretation. *See* GUARDIANS AND WARDS ACT, Ss. 12, 25 and 4 (5) (*b*) (*ii*). **40 P.L.R. 64.**

———**S. 7**—*Application by guardian appointed under will—Probate not obtained—Application, if maintainable.*

An application by a person who has been appointed guardian of a minor under a will, to be appointed as a guardian can be entertained even though he has not obtained probate of the will. It is not incumbent on him to take out probate as a condition precedent to his obtaining a certificate of guardianship. (*Collister and Bajpai, JJ.*) GANESHJI PANDEY *v.* MST. BHAGIRATI. **58 All. 832=163 I.C. 242 (1)=8 R.A. 928 (1)=1936 A.W.R. 344=1936 A.L.J. 331=1936 All.L.R. 531=A.I.R. 1936 All. 368.**

———**S. 7**—*Appointment of guardian—Compromise by applicants—Duty of Court.*

The appointment of a guardian of a minor cannot be settled by an agreement between the contesting applicants for guardianship. The Court has to consider the welfare of the minors on evidence before it and not to pass judgment in accordance with the terms of a compromise. It is the duty of the Court to consider whether or not the compromise is in the interest of the minor. (*Ram Lall, J.*) HASSAN BI *v.* NEK ALAM. **185 I.C. 809=12 R.L. 320=41 P.L.R. 678=A.I.R. 1940 Lah. 9.**

———**S. 7**—Guardian not residing within local limits of jurisdiction—Appointment of—Discretion of Court. *See* GAURDIANS AND WARDS ACT, S. 39 (*h*). **A.I.R. 1940 Pesh. 14.**

———**S. 7**—*Guardian of property of minor—Appointment of—Enquiry as to property—Necessity for.*

In an application for the appointment of a guardian for the property of a minor, it must be shown that the minor has some property, as without that there is no foundation for the application. An enquiry for such purpose is, no doubt, not meant to be a lengthy and elaborate one, but there must be some basis for finding that there is some property at all. (*Ram Lall, J.*) HASSAN BI *v.* NEK ALAM. **185 I.C. 809=12 R.L. 320=41 P.L.R. 678=A.I.R. 1940 Lah. 9.**

———**Ss. 7 and 17**—*Minor girl aged three—Contest for guardianship between remarried mother and paternal grandfather—Girl in custody of mother—Preference.*

Where there is a contest, in respect of the guardianship of the person of a minor girl aged about three years between her mother who has remarried and the minor's paternal grandfather who applies for being appointed the guardian of the girl and the girl is in the custody of her mother, the primary question for decision is whether it is necessary for the welfare of the minor for the guardian of the person to be appointed at all. The person who has her interests most at heart is the mother, and in view of the age of the minor it would not be for her welfare to be taken away from her mother and handed over to her paternal grandfather and no appointment of guardian is necessary for the welfare of the minor. The mere fact that the mother had agreed to hand over the child to her paternal grandfather on being allowed to remarry makes no difference as the welfare of the minor is the overriding consideration. (*Almond, J.C.*) MT. FATIMA *v.* DARWAZ. **160 I.C. 1013=8 R. Pesh. 147=A.I.R. 1936 Pesh. 63.**

———**S. 7**—*Minor over 17 Years—Appointment of guardian—Propriety.*

It is not proper for a Court to appoint a guardian of a person of a minor who is at least over 17 years old, as he comes of age very soon. The order of appointment would simply deprive him of his right to manage his own affairs for three years more. It is not for the Courts to moralize on the advantage of keeping a youth under tutelage for a longer period than the law ordinarily contemplates. (*Addison and Ram Lall, JJ.*) VISHWA NATH SAREEN *v.* MT. KARAM DEVI, **182 I.C. 992=12 R.L. 96 (2)=41 P.L.R. 542=A.I.R. 1939 Lah. 221.**

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———Ss. 7 and 12—*Powers of Court—Hindu father—Will appointing guardian for minor child—Effect of—Application for probate—Order pending application giving custody of minor to person other than guardian appointed by will—Validity.*

A Hindu father has the absolute right of appointing by will the guardian of his minor child and the will so far as the appointment of the guardian is concerned speaks from the date of the testator's death. And when there is a testamentary guardian, the Court has no power to appoint another person as the guardian or to give another person the custody of the minor child, unless it be temporary custody under S. 12 of the Guardians and Wards Act, until the testamentary guardian is removed from his office. In such a case the fact that the will remains unprobated and that there is a contest as to its validity may be a ground for the Court passing an order for the temporary custody of the minor child, but the Court cannot say that it will refuse to take notice of the will and pass an order for the custody of the minor in favour of a person other than the testamentary guardian. (*Leach, C.J. and Lakshmana Rao, J.*) AMIRTHAVALLI AMMAL *v.* SIRONMANI AMMAL. **I.L.R. (1938) Mad. 757=47 L W. 470=(1938) M.W.N. 267=(1938) 1 M. L.J. 422.**

———Ss. 7 and 39—*Power of Court to appoint as well as remove.*

A Court which has jurisdiction under the Guardians and Wards Act can remove a guardian as well as appoint him. Where in the first instance an *ex parte* order of appointment is made, it can, when the matter comes up for final orders, be set aside by the same Court. (*Allsop, J.*) MAZHAR ALI KHAN *v.* MST. KULSUM BEGAM. **189 I.C. 823=1940 A.W.R. (H.C.) 270=A.I.R. 1940 All. 315.**

———Ss. 7 (3) and 39—*Guardian appointed by will—Power of Court to appoint another guardian.*

If a guardian has been appointed of the persons and property of the minor sons by their father by means of a will, the Court has no jurisdiction to proceed with the appointment of another guardian until the guardian appointed by the will is removed from guardianship under the provisions of S. 39 of the Guardians and Wards Act. (*Abdul Rashid, J.*) ABDUL QUADIR *v.* MT. FATIMA. **41 P.L.R. 12.**

———Ss. 8 and 25—*Illegitimate minor girl aged seven years—Mother living with another paramour—Girl in possession of putative father—Appointment of guardian—Duty of Court—Considerations.*

A putative father, who is required under Hindu Law, to maintain his illegitimate daughter is *prima facie* entitled to see that she is brought up properly and is given in marriage in a respectable family, and if he approaches the Court for appointment of a guardian, the Court is bound to exercise its jurisdiction and to decide who should be the proper guardian. The mother of an illegitimate minor girl aged 7 years was a low caste widow living with another paramour, having left the putative father of the girl. The putative father of the girl against whom an order under S. 488, Cr.P. Code, for maintenance of the girl

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was passed, managed to get possession of the girl. His application for being appointed guardian of the girl was dismissed without proper enquiry. The mother applied for being restored to possession of the girl. It appeared that if the girl, who was intelligent and impressionable continued to live with her mother, it was very likely that her morals would be corrupted and it would also be difficult to get her married if she stayed with her mother. The girl was taken care of by the female relations of the putative father.

Held, that the possession of the girl could not be restored to the mother, who was leading an immoral life. It was a fit case in which a guardian of the minor should be appointed whether it was the putative father or any one else whom the Court considered fit, certain conditions being imposed on him with regard to the marriage of the minor and her being brought up in healthy surroundings. 12 Mad. 67 Rel. on; 1 Bom. 97 and 13 M. I. A. 497 (P.C.), Ref. (*Rupchand Bilaram and Mehta, A.J.Cs.*) KOOVERJI DEVJI *v.* MOTIBAI. **163 I.C. 192=8 R.S. 188=A.I.R. 1936 Sind 63.**

———S. 8 (b)—*Right to apply—First cousin of minor.*

A first counsin of a minor comes within the terms of S. 8 (*b*) of the Act and is, therefore, entitled to make an application for the appointment of a guardian. (*Henderson and Khundkar, JJ.*) SRIPAT SINGH DUGAR *v.* MOHINI SUNDARI. **I.L.R. (1939) 2 Cal. 440=185 I.C. 880=12 R.C. 420.**

———S. 9 (1)—*Applicant for guardianship—If must reside within jurisdiction.*

It is not necessary that the applicant for guardianship of the person of a minor should reside in the district in which the application is made. 36 A. 280, Diss. from. (*Skemp, J.*) MT. NAZIR BEGUM *v.* GHULAM QADIR KHAN. **18 Lah. 426=175 I.C. 318=10 R.L. 702=39 P.L.R. 640=A.I.R. 1937 Lah. 797.**

———S. 9 (1)—*Application by mother for guardianship—Children with father living in Rohtak district—Father obtaining their custody by compromise in criminal case—Mother living in Ferozepore—Jurisdiction of Ferozepore Court.*

A mother of minor children, who was living in Ferozepore District filed an application in that district for guardianship of her children. The minors were with the father who was living in Rohtak district. The father obtained their custody as a result of a compromise with the mother in a criminal case. The elder child was born in Rohtak district and the younger in Ferozepore.

Held, that in the circumstances the minors must be taken to ordinarily reside in Rohtak district and that, therefore, the Ferozepore Court had no jurisdiction to hear the application. (*Skemp, J.*) MT. GOMAN *v.* **MUNSHI RAM. 40 P.L.R. 708.**

———S. 9 (1)—*Jurisdiction—Determining factor.*

The fact that a minor is found actually residing at a place at the time the application under the Act is made does not determine the jurisdiction. It must be proved where the minor ordinarily resides, as required by S. 9 (1) of the Guardians and Wards Act. The mere fact that the minors were taken to a place when the mother went to

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visit the place would not make that place the place of ordinary residence of the minors. (*Ganga Nath, J.*) LALITA *v.* PARMATMA PRASAD. **I.L.R. (1940) All. 269=190 I.C. 351=1940 A.L.J. 238=1940 A.W.R. (H.C) 241=A.I.R. 1940 All. 329.**

——**Ss. 9 (1) and 25**—*Jurisdiction under—Conditions of.*

In order to give the Court jurisdiction for purposes of appointment of guardian under S. 9 (1) and for purposes of passing orders under S. 25 of the Guardians and Wards Act, the minor must be ordinarily resident within the local limits of the Court's jurisdiction. (*Broomfield and Wassoodew, JJ.*) CHIMANLAL GANPAT *v.* RAJARAM. **I.L.R. 1937 Bom. 348=168 I.C. 846=9 R. R. 408=39 Bom.L.R. 103=A.I.R. 1937 Bom. 158.**

——**Ss. 12 and 25**—*Applicability—Application by appointed guardian for custody of minor.*

The Court can entertain an application by a guardian appointed by it for the custody of the minor under the provisions of Ss. 12 and 25 of the Guardians and Wards Act. So long as the custody of a minor is not actually made over to the guardian appointed by Court, the proceeding for the appointment of the guardian does not terminate and the applicability of S. 12 is not barred. There is another way of looking at the matter. A minor who is not delivered to the guardian afer he has been appointed by a competent Court, can be treated as having left or been removed from the custody of the guardian under S. 25 (1) of the Act. (*Addison and Din Mohammad, JJ.*) MT. NAZIR BEGUM *v.* GHULAM QADIR KHAN. **I.L.R. (1938) Lah. 318=181 I.C. 206=11 R.L. 785=40 P.L.R. 64=A.I.R. 1938 Lah. 313**

——**Ss. 12, 25 and 4, (5) (b) (ii)**—*Application by appointed guardian for custody of minor—Minor removed from jurisdiction of Court—Court, if can entertain application.*

The Court has jurisdiction to entertain an application made to it by a guardian appointed by it for the custody of the minor under Ss. 12 (1) and 25 of the Guardians and Wards Act, although the minor has been removed out of its jurisdiction. To place a restricted meaning on the words "for the time being ordinarily resides" in S. 4 (5) (*b*) (ii) so as to interpret them to mean where the minor actually is at the time of the application would be tantamount to rendering nugatory all the provisions of the Act and to making the law helpless against the machinations of recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. (*Addison and Din Mohamad, JJ.*) MT. NAZIR BEGUM *v.* GHULAM QADIR KHAN. **I.L.R. (1938) Lah. 318=181 I.C. 206=11 R.L. 785=40 P.L.R. 64=A.I.R. 1938 Lah. 313.**

——**Ss. 12 and 43 and C.P. Code, O. 39**—*Distinction in the powers exercisable under.*

There is a difference between a Court issuing an injunction under O. 39, C.P. Code and a Court exercising similar powers under the Guardians and Wards Act in the interests of the minor. Ss. 12 and 43 of the latter Act enable the Court to pass orders *suo motu* unlike O. 39,

GUAR. & WARDS ACT (1890), S. 17.

R. 2, C.P. Code and it can *suo motu* deal with disobedience of its orders. (*Niyogi, J.*) DISTRICT JUDGE, CHHINDWARA *v.* BASORI LAL. **189 I.C. 813=1940 N.L.J. 157=41 Cr.L.J. 803=A.I.R. 1940 Nag. 203.**

——**S. 17**—*Hindu girl abducted by Mahomedan—Girl found to have embraced Islam—Mother's right to custody and guardianship.*

In appointing a guardian under the Guardians and Wards Act the welfare of the minor is the first consideration and the term "welfare" includes both material and spiritual welfare. In law the religion of a minor is that of his or her parents. A Hindu girl who had been abducted by a Musalman was traced by the police and was placed in the custody of a Mahomedan gentleman by the order of the District Magistrate. Her mother applied to be made the guardian of her person. The girl alleged that she had embraced the religion of Islam. The girl's father was dead and her uncle did not object to the appointment of the mother as guardian. Nothing was proved to show that the mother was not in all respects a fit and proper guardian except that she was a Hindu.

Held, that there was no legal justification for refusing the mother's request to be granted the custody and guardianship of her child and that the girl's alleged conversion to Islam was not a valid reason for refusing to appoint the mother as guardian. (*Middleton, J.C.*) MT. MANSA DEVI *v.* MAKHAR. **166 I.C. 551=9 R. Pesh. 67=A.I.R. 1936 Pesh. 207.**

——**S. 17**—*Minor girl living with mother's sister from infancy—Father's right to her custody.*

When a minor girl is living and has been living with her mother's sister, ever since her mother's death when she was an infant and now when she is of marriageable age, it is not in the interests of the minor that her custody should be given to her father. (*Jai Lal, J.*) GHULAM HUSSAIN *v.* IDA. **39 P.L.R. 129=170 I.C. 592=10 R.L. 141 (1)=A.I.R. 1937 Lah. 481.**

——**S. 17**—*Welfare of minor—Consideration as to—If can override law to which minor is subject.*

The Guardian and Wards Act does not permit the Court to subordinate the law to which the minor is subject to the considerations of what will be for the minor's welfare. (*Harris and Misra, JJ.*) KUNDAN *v.* AISHA BEGAM. **I.L.R. (1938) All. 963=178 I.C. 1003=11 R.A. 342=1938 All.L.R. 931=1938 A.L.J. 982=1938 A.W.R. (H.C.) 698=A.I.R. 1939 All. 15.**

——**Ss. 17 (1) and 25**—*Hindu minor girl below 18 years of age—Conversion to Mahomedanism and marriage with Mahomedan—Validity—Absence of father's consent or knowledge—If fatal.*

If a girl willingly and with understanding embraces the Mahomedan religion, the fact that she was under 18 years of age would not invalidate the conversion and make her subsequent marriage void, if all the necessary formalities at the conversion and the subsequent nikah had been faithfully observed, because a minor girl above 15 years, *i.e.*, the age of majority under the

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Mahomedan Law, can be validly converted to the Mahomedan religion if in addition to a mere repetition of the words of faith she has understood their meaning. The Court is not concerned to inquire into the motive or sincerity of religious belief or observance. (*Davis, J.C.*) MAHOMED ALAM, *In re*. **186 I.C. 183=12 R.S. 185=A.I.R. 1939 Sind 311.**

——**S. 19**—If bars an application by the father under S. 25. *See* GUARDIANS AND WARDS ACT, Ss. 25 AND 19. **1940 A.L.J. 238.**

——**S. 19**—Scope—If controls S. 3 of the Majority Act—Father of a minor alive and fit—Order appointing guardian—Legality—Effect on period of minority. *See* MAJORITY ACT, S. 3. **32 S.L.R. 215.**

——**Ss. 25 and 12**—Applicability—Application by appointed guardian for custody of minor. *See* GUARDIANS AND WARDS ACT, Ss. 12 AND 25. **40 P.L.R. 64.**

——**S. 25**—*Applicability—Custody of child with mother—Father desiring to act as natural guardian—Right of.*

If a father has had the care and custody of his infant child, he may be within the definition of the Act a "guardian" and the provisions of Ss. 24 and 25 may then apply to him. But when he has not had the custody of his infant child, S. 25 cannot apply although he desires to act as a natural guardian, when the custody of the child had all along been with its mother. (*Baguley and Mackney, JJ.*) MANOO ALI *v.* HAWABI. **161 I.C. 632=8 R.R. 498=A.I.R. 1936 Rang. 63.**

——**Ss. 25, 12 and 4 (5) (b) (ii)**—Application by appointed guardian for custody of minor—Minor removed from jurisdiction of Court—Court, if can entertain application. *See* GUARDIANS AND WARDS ACT, Ss. 12, 25 AND 4 (5) (*b*) (ii). **40 P.L.R. 64.**

——**Ss. 25, 4 (5) (b) (ii) and 12**—*Application by mother for custody of minor daughter—Minor removed from Court's jurisdiction—Application, if can be granted.*

Where the mother's application of 14th May, 1935, for being appointed guardian of her minor daughter, was removed from the Court's jurisdiction only a few weeks before the application, was granted on 7th January, 1937, on the ground that the child ordinarily resided in the Court's jurisdiction and on 2nd February, 1937, the mother applied to the same Court for the custody of her daughter.

Held, that minor was not for the time being residing within the jurisdiction of the Court and hence the application could not be granted.

Held also, that S. 12 was not applicable, as it applied to proceedings before the appointment of a guardian. (*Coldstream, J.*) MT. NAZIR BEGAM *v.* GHULAM QADIR KHAN. **177 I.C. 427=11 R.L. 319=A.I.R. 1938 Lah. 84.**

——**S. 25**—*Application under by person resident beyond jurisdiction of Court—Power of Court to appoint him guardian and to pass order in his favour.*

There is no legal prohibition against the appointment of a person as a guardian who is not residing within the jurisdiction of the Court or the making of an order under S. 25 of the

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Guardians and Wards Act in favour of such a person, though naturally the Courts would as an ordinary rule be reluctant to make such an order. (*Broomfield and Wassoodew, JJ.*) CHIMANLAL GANPAT *v.* RAJARAM. **I.L.R. (1937) Bom. 348=168 I.C. 846=9 R.B. 408=39 Bom.L.R. 103=A.I.R. 1937 Bom. 158.**

——**S. 25**—*Burmese woman embracing Sikhism and marrying Sikh—Such woman later on leaving husband and reverting to her old religion—Sikh father's right to custody of children.*

Where a Burmese woman being first of all a Buddhist embraces Sikhism and marries a Sikh but later on after having lived with him as husband and wife leaves him and reverts to her old religion, the children born of such wedlock should normally be brought up as Sikhs. The Sikh father is under such circumstances entitled to the custody of the children as against such wife unless he is shown to be unfitted by reason of his depraved moral character or other sufficient cause. (*Baguley and Mosely, JJ.*) MA YA SHIN *v.* NEHAL SINGH. **173 I.C. 443=10 R.R. 346=A.I.R. 1937 Rang. 360.**

——**S. 25 (1)**—*Construction—"Removal"—Refusal to hand over minor to person having constructive custody.*

The words of S. 25 must be given a more liberal interpretation than they are literally entitled to. When a person who has the actual custody of a minor refuses to hand over the said minor to the person who has the constructive custody and the lawful right to actual custody there is a "removal" within the meaning of that section. (*Collister, J.*) SHEOKUMARI *v.* MATHURA RAM. **I.L.R. (1937) All. 82=161 I.C. 816=8 R.A. 786=1936 A.L.J. 211=1936 All. L.R. 329=1936 A.W.R. 183=A.I.R. 1936 All. 267.**

——**S. 25**—*Custody of children—Right of father.*

The father has an inalienable right to custody of his children and he cannot be deprived of it except for strong reasons. (*Bhide, J.*) MT. BASANT KUAR *v.* GIAN SINGH. **41 P.L.R. 841=A.I.R. 1939 Lah. 359.**

——**S. 25**—*Discretion of Court—Hindu father leaving minor daughter in custody of another—Failure to look after and maintain her for several years—Right to custody of minor daughter—Injunction restraining marriage of daughter—Right to.*

A father of a minor is not entitled to apply under the Guardians and Wards Act for an order appointing him the guardian of the person or property of the minor. A Hindu father is the lawful guardian of his minor child and a declaration by the Court cannot increase his powers. Where a father delivers his infant daughter to the custody of another and for over 15 years takes no interest in her, but allows others to do what as a father he should do, and the girl is brought up by that other person and is never again received in her father's house, it is evident that the father who must be taken to have abandoned her is not fitted to exercise the rights of a father. He is certainly not a person in whose favour the Court should pass an order under S. 25 of the Guardians and Wards Act. Nor

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would he be entitled to the grant of an injunction restraining the person having custody of the minor from marrying her to a man who has been chosen by that person. (*Leach, C.J. and Krishnaswamy Ayyangar, J.*) SIVASANKARA MUDALIAR *v.* RADHABAI AMMAL. **185 I.C. 647 =12 R.M. 567=1939 M.W.N. 483=50 L. W. 520=A.I.R. 1939 Mad. 611=(1939) 2 M, L.J. 515.**

——**Ss. 25 and 19**—*Illegitimate children—Application by father for custody—Mother leading immoral life—Proper order to be passed.*

Where a father applies for the custody of his illegitimate children by a prostitute, and it is found that the mother was continuing to lead a life of prostitution, it is in the interests of the minors that they should not be allowed to remain in the custody of the mother and that the father should be given their custody. S. 19 is not a bar to such an order being made. (*Ganga (Nath, J.)* LALITA *v.* PARAMATMA PRASAD. **I.L.R. (1940) All. 269=190 I.C. 351=1940 A.L.J. 238=1940 A.W.R. (H.C.) 241=A. I.R. 1940 All. 329.**

——**S. 25**—Jurisdiction under—Conditions. *See* GUARDIAN AND WARDS ACT, Ss. 9 (1) AND 25. **39 Bom.L.R. 103=A.I.R. 1937 Bom. 158.**

——**S. 25**—*Minor girl below* 18 *years of age—Change of religion from Hinduism to Mahomedanism and marriage with Mohomedan—Father's right to custody—If lost.*

A minor, provided he or she is old enough to understand the nature of his or her acts, though under 18 years of age, is able in spite of the father's power of general control over his or her education, religious and otherwise, to change his or her religion. But in this, as in all other matters under the Guardians and Wards Act, the Court in deciding who shall have the custody of the minor will consider first the welfare and interest of the minor and in so doing the Court can set aside her own preferences in her own interest and for her good. Further, a father does not lose the right of custody of his minor child if he becomes converted to another religion or if his child becomes so converted. (*Davies, J.C.*) MAHOMED ALAM, *In re*. **186 I.C. 183=12 R.S 185=A.I.R. 1939 Sind 311.**

——**S. 25 (1)**—*Order for arrest and delivery of minor to guardian—Conditions of—Duty of Court to be satisfied that the minor's welfare demands return to guardian.*

Before the Court can pass an order for the arrest and delivery of a minor girl to her husband, the guardian, the Court has first to be satisfied that it is for the welfare of the ward to return to her guardian. The Court cannot assume that it is for her welfare to so return, and if the question, the order will be set aside. (*Cornish, J.*) VENKAYAMMA *v.* SURAYYA. **163 I.C. 88 =8 R.M. 1084=1936 M.W.N. 414=43 L. W. 650=A.I.R. 1936 Mad. 556=71 M.L. J. 396.**

——**S. 25**—*Remedy under—Availability—Husband having decree for restitution of conjugal rights against his minor wife.*

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Where a husband obtains a decree for restitution of conjugal rights against his minor wife, his only remedy would be to get an attachment against the property of his wife, if she has any. It would be altogether wrong to permit the husband to achieve his object by making an application under the provisions of S. 25, Guardians and Wards Act, to take custody of his minor wife against whom the decree was passed. A.I. R. 1930 Mad. 19, Dist.; 1936 A.L.J. 211=A. I.R. 1936 All. 267=161 I.C. 816, Reversed. (*Sulaiman, C.J. and Richhpal Singh, J.*) MT. SHEO KUMARI *v.* MATHURA RAM. **I.L.R. (1937) A. 82=1936 A.L.J. 935=1936 All.L. R. 819=164 I.C. 915=9 R.A. 206=1936 A. W.R. 767=A.I.R. 1936 All. 657.**

——**S. 27**—*Duties of guardian—Purchase of land for minor—Propriety of—Agent of* de jure *guardian purchasing property with consent of guardian—Liability to account to minor—Considerations—"Trustee".*

A guardian of a minor, although he occupies a position which is fiduciary in character, cannot be held to be debarred from acquiring immovable property on behalf of his ward, provided in doing so he acts as a prudent man who is acting carefully with his own money. Though a guardian in possession of minor's property may fall under S. 94 of the Trusts Act, he cannot be held in every case to come within S. 95 of the Trusts Act as the word "so far as may be" in that section make it subject to S. 27 of the Guardians and Wards Act. *P* who effected a partition and separated from his brother *S*, died subsequently leaving a pregnant widow and a daughter. *S* took possession of his brother's properties and managed them at the request of the widow, who later gave birth to a son, and other relations of *P*, *and*, in the course of management, he purchased some immovable properties with the consent of the widow who was the *de jure* guardian of the *minor son of P*; it was found that the purchase was a prudent act, though later on depression in the market rendered it a losing bargain.

Held, that the purchase was good and could not be challenged or questioned by the minor; the position of *S* was more that of an agent to the mother and *de jure* guardian of the minor, and not that of a guardian himself; and the act of purchase by him with the consent of the principal and legal guardian was a complete reply to any action taken by the minor against *S*. (*King and Abdur Rahman, JJ.*) SITHALINGA CHETTI *v.* ARDHANARI CHETTI. **189 I.C. 170=13 R.M. 175=49 L.W. 644=1939 M.W.N. 564=A. I.R. 1939 Mad. 645=(1939) 1 M.L.J. 745.**

——**Ss. 27, 29 and 30**—*Powers of guardian—Simple loan—Lender making enquiries as to necessity—Application of money for minor's benefit—If necessary—True necessity not mentioned in recitals—Effect of.*

Under S. 27 of the Guardians and Wards Act, a guardian may, subject to the provisions of the Act, do all acts which are reasonable and proper for the realisation, protection or benefit of the property of the minor. Other sections in the Act place restrictions on the guardian's power to alienate or charge the immovable property of the

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minor. It follows that the restrictions contained in S. 29 of the Act and the provisions of S. 30 do not apply to a mere borrowing of money by a guardian. A loan contracted without the sanction of the Court by a guardian appointed under the Act will be binding upon the minor if the lender had made proper enquiries and had satisfied himself as to the legal necessity for the loan, whether or not the money was actually applied for the benefit of the minor. The fact that the true necessity was not mentioned in the recitals in the bond is of little importance, as such recitals are merely a piece of evidence as to the nature of the alleged necessity and are not conclusive on the point. (*Khundkar and Lodge, JJ.*) ANIL KUMAR DAS *v.* PROBHABATI MITRA. **44 C.W.N. 1048=A.I.R. 1940 Cal. 532.**

———**Ss. 29 and 30**—*Applicability—Release by guardian of minor mortgagee's sub-soil rights—If void—Suit to set aside—Limitation.*

A deed executed by a guardian of a minor mortgagee releasing from operation of mortgage the sub-soil rights of the mortgage land in favour of lessee of the mortgagor in consideration of certain sum is a transfer of the equity of redemption and is covered by the wording of S. 29. The fact that the consideration mentioned in the deed was neither adequate nor reasonable nor for the benefit of the minor is no ground whatsoever for holding that the deed is void. Such deed is only a voidable transaction and requires to be avoided or set aside within the period of limitation and by the person affected thereby. The suit to set aside the deed is governed by Art. 44, Limitation Act. (*Wort and Manohar Lall, JJ.*) JAGADAMBA PRASAD *v.* ANADI NATH. **17 Pat. 460=176 I.C. 273=19 Pat. L.T. 594=1938 P.W.N. 951=4 B.R. 697=11 R.P. 59=A.I.R. 1938 Pat. 337.**

———**S. 29**—*Applicability—Temporary guardians.*

S. 29 of the Guardians and Wards Act refers to the powers of guardians appointed and declared by the Court whether they are permanent or temporary guardians. An order of Court directing the sale of property by a temporary guardian is, therefore, not *ultra vires*. (*Dalip Singh, J.*) RAMESH CHANDRA JOSHI *v.* MURLI MANOHAR JOSHI. **40 P.L.R. 153 (1)=176 I.C. 596=11 R.L. 217=A.I.R. 1938 Lah. 308.**

———**S. 29** — *Applicability — "Transfer"—Family settlement not conferring any title but only relinquishing rights in property assigned by one party to another—Recognition of antecedent rights of assignee—Sanction of Court—Necessity.*

A deed of family arrangement entered into by a certificated guardian in which no distinct title is conferred on any body and all that is done is a relinquishment of claim by some person in respect of property assigned to another and a recognition of the antecedent right of that other person to the property does not amount to a transfer falling within S. 29 of the Guardians and Wards Act, requiring sanction of the Court. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJ-UL-HAQUE. **I.L.R. (1938) All, 125=1938 A.L.J. 23=1938 A.W.R. 98 (H.C.)=174 I.C. 738=1938 A.L.R. 324=10 R.A. 615=A.I.R. 1938 All. 170.**

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———**Ss. 29, 33 and 34**—*Court authorising guardian to raise simple loan—Duty of lender to enquire as to necessity.*

If an order of Court authorises the guardian of a minor to raise a loan on the security of the minor's estate, the lender is entitled to trust to that order and is not bound to enquire as to the expediency or necessity of the loan for the benefit of the minor's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but, apart from any charge of that kind he is entitled to rest upon the order. There is no reason why the same principle should not apply when the guardian instead of raising a loan on the security of the minor's property obtains money on a simple bond after obtaining the sanction of the Court for a simple loan, 11 Cal. 379 (P.C.), Appl. (*Thom and Bajpai, JJ.*) BENARES BANK, LTD. *v.* DIP CHAND. **160 I.C. 64=8 R.A. 560=1936 A.W.R. 87=1936 A.L.R. 44=1936 A.L.J. 155=A.I.R. 1936 All, 172.**

———**S. 29**—*Scope — Compliance—Permission obtained by guardian for mortgage for specified amount on certain terms—Subsequent change of circumstances—Mortgage executed for less amount on different terms—Validity—Fresh sanction—Necessity for.*

S. 29 of the Guardians And Wards Act is imperative, and absence of permission for a particular alienation renders it void. Where permission is applied for a particular mortgage of the Ward's property for a specified amount on certain terms and granted by the Court, and circumstances change subsequently and part of the money is not required, the guardian is bound to obtain a new permission from the District Judge for a mortgage under the changed circumstances. If the guardian executes a mortgage for an amount less than that specified in the original sanction application, or on different terms without fresh permission, the mortgage so executed is invalid and unenforceable against the minor, because the former permission cannot cover the mortgage which is different from the contemplated one and executed under different circumstances. The provisions of S. 29 cannot be said to be complied with. (*Bennet, J.*) UDAI PAL SINGH *v.* PYARE. **1938 A.L.R. 217=1937 A.L.J. 1351=1938 A.W.R. 6 (H.C.)=174 I.C. 73=10 R.A. 543=A.I.R. 1938 All. 109.**

———**Ss. 29 and 30**—*Scope—Transfer of guardian—If void.*

A transfer by the guardian without leave of the Court is only voidable and not void. S. 30 says that transaction shall be voidable and not *ab initio* void. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SIVANMALAI GOUNDAN *v.* ARUNALACHALA GOUNDAN. **182 I.C. 862=12 R.M. 150=1938 M.W.N. 802=A.I.R. 1938 Mad. 822=(1938) 2 M.L.J. 428.**

———**S. 29**—*Transfer without sanction—Avoidance—Restoration of benefit.*

In a case where the property of a minor has been conveyed by the guardian without permission of the District Judge, the minor in a suit

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brought against him, cannot avoid the transfer without restoring the benefit which he has received. (*Collister and Bajpai, JJ.*) JAI NARAIN LAL *v.* BECHOO LAL. I.L.R. (1938) All. 614=1938 A.L.J. 521=1938 A.W.R. (H.C.) 343=176 I.C. 369=10 R.A. 81=1938 A.L.R. 597=A.I.R. 1938 All. 369.

——S. 29 (b)—*Certified manager—Power to create occupancy tenancy without permission of Court.*

When a certified manager creates an occupancy tenancy, whether deliberately or inadvertently, by giving a lease without the previous permission of the Court the landlord is not bound by it. It is not in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. (*Grille, J.*) GOVINDRAO BALWANTRAO *v.* RUMA ATMARAM. I.L.R. (1939) Nag. 221=11 R.N. 186=177 I.C. 931=A.I.R. 1938 Nag. 314.

——S. 30—*Applicability to persons other than minor.*

Quaere. Whether the words of S. 30 of the Guardians and Wards Act contemplate the avoiding of a transaction by a person other than the minor. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SIVANMALAI GOUNDAN *v.* ARUNACHALA GOUNDAN. 182 I.C. 862=12 R.M. 150=1938 M.W.N. 802=A.I.R. 1938 Mad. 822=(1938) 2 M.L.J. 428.

——S. 30—*"Guardian" contemplated by.*

It is clear that the "guardian" contemplated by S. 30 of the Guardians and Wards Act, is not only a certificated guardian who is the natural guardian of the ward, but also a certificated guardian who is not the natural guardian. (*Collister and Bajpai, JJ.*) JAI NARAIN LAL *v.* BECHOO LAL. I.L.R. (1938) All. 614=1938 A.L.J. 521=1938 A.W.R. (H.C.) 343=176 I.C. 369=10 R.A. 81=1938 A.L.R. 597=A.I.R. 1938 All. 369.

——S. 30—*Scope—Mortgage in favour of minor—Transfer by guardian—Suit on mortgage by minor—Effect—Suit by assignee—Maintainability—Limitation Act, Art. 44—Suit by minor to set aside transfer—If obligatory.*

When an assignment by the guardian of a minor of a mortgage to which the minor is entitled is repudiated by the minor, the minor himself filing a suit for recovery of the mortgage money, the assignee has no right to file a suit on the mortgage as assignee and to ask the Court to recognise his transfer. It is not correct to say that the minor cannot repudiate a transfer by his guardian except by filing a suit under Art. 44 of the Limitation Act. S. 30 of the Guardians and Wards Act makes the transfer voidable and it is unnecessary to inquire whether it was beneficial to the minor or not. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SIVANMALAI GOUNDAN *v.* ARUNACHALA GOUNDAN. 182 I.C. 862=12 R.M. 150=1938 M.W.N. 802=A.I.R. 1938 Mad. 822=(1938) 2 M.L.J. 428.

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——Ss. 30 and 31—*Scope—Sanction to guardian to mortgage ward's property for purpose of discharging decree debt—Mortgage by guardian for amount advanced—Person advancing money on faith of sanction—Duty to see to the application of money—Bulk of loan applied to purpose sanctioned—Balance applied for purpose not sanctioned—Creditor's right to claim whole amount of loan—Proof of necessity.*

Where a guardian of a minor appointed under the Guardians and Wards Act obtains the sanction of the Court authorising him to execute a mortgage of the minor's property and to borrow a certain amount for the purpose of paying off a mortgage decree against the estate, and executes a mortgage for the amount authorised by Court, and no fraud or underhand dealing is alleged, the person who lends money to the guardian and takes a mortgage from the guardian is entitled to rely upon the sanction itself for the validity of the transaction. The lender is not bound to go behind the order of the Court sanctioning the mortgage, is entitled to rely upon it, and if he acts *bona fide*, he is not bound to see to the application of the money or any part of it. The circumstance that the guardian does not subsequently apply the money in its entirety for the purpose for which he borrows it is irrelevant. If the guardian applies the bulk of the money borrowed for the purpose sanctioned by the Court, but applies a small part of it for a different purpose which is not sanctioned, it would still be open to the creditor who has advanced the money to establish that there was legal necessity for that amount also when he has paid the whole amount of the consideration on the faith of the sanction, and the amount advanced does not exceed the amount sanctioned by the Court, he is entitled to claim the whole amount advanced by him as a mortgagee. (*Wassoodew and Thakor, JJ.*) VINAYAK *v.* SHANTABAI. 40 Bom.L.R. 180=175 I.C. 291=10 R.B. 531=A.I.R. 1938 Bom. 234.

——S. 31—*Holding of enquiry—If essential—Application by guardian for permission mentioning one debt and sale-deed purporting to pay off different debts—Sale made for higher sum than that proposed—Interest of minor, if prejudiced.*

S. 31 of the Guardians and Wards Act does not make the holding of any enquiry by Court essential. The fact that the guardian mentioned one debt in the application for permission for sale but the sale-deed purports to have been executed to pay off totally different debts, and the fact that the sale was actually made for higher sum than that proposed do not show that the interests of the minor were prejudiced in any manner by the sale. (*Zia-ul-Hasan and Smith, JJ.*) SUNDAR LAL *v.* GUR SARAN LAL. 10 R.O. 187=172 I.C. 637=1938 O.A. 34=1938 O.L.R. 14=1938 O.W.N. 104=A.I.R. 1938 Oudh 65.

——S. 31—*Mortgage effected by guardian with Court's sanction—Enquiry as to necessity—Duty of mortgagee.*

A person who advances money to a guardian on a mortgage of the minor's property, effected under sanction of the Court, is entitled to trust the Court's sanction and is not bound to go be-

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hind it and enquire as to the expediency or necessity of the loan for the benefit of the minor's estate, unless there was fraud or underhand dealing, to which the mortgagee was a party. (*Tek Chand and Dalip Singh, JJ.*) BRIJ RAJ SARAN *v.* ALLIANCE BANK OF SIMLA. **17 Lah. 688=169 I.C. 157=9 R.L. 708=39 P. L.R. 83=A.I.R. 1936 Lah. 946.**

——**S. 31**—*Sanction under—Effect—Sale by guardian with Court's sanction—Binding character—Alienee—If bound to prove necessity or benefit to minor.*

A sale of the property of a minor by a guardian appointed by the Court, with the sanction of the Court, has to be upheld, and the alienee can rely upon, and is protected by, the order of consent, unless it is shown that the order of sanction was obtained by fraud or underhand dealing and that the alienee was a party thereto. It is not necessary for the alienee to prove that the transaction was in the interests of the minor. (*Broomfield and Tyabji, JJ.*) BALAJI VASUDEO *v.* SADASHIV KASHINATH. **I. L. R. (1937) Bom. 1=165 I.C. 530=9 R.B. 150=38 Bom.L.R. 796=A.I.R. 1936 Bom. 389.**

——**S. 31**—*Scope—If exhaustive—Powers of High Court apart from—Application by Hindu father to appoint him guardian of minor son's undivided share and to sanction alienation—Maintainability—Jurisdiction of Court.*

Under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The High Court has also jurisdiction to sanction an alienation by the father of a minor or the manager of a joint family where the Court is satisfied that the transaction is for the benefit of the minor. The father or manager has no doubt power under the Hindu Law to sell or mortgage for legal necessity or for the benefit of the estate; but that is no ground for depriving the father or manager in a Hindu joint family of his right to come to the High Court and apply to appoint him the guardian of the property of a minor member and for empowering him as such to sell or mortgage the family estate including the minor's undivided share, and if the requisite facts are proved the Court ought in a proper cause to make an order sanctioning the alienation. (*Beaumont, C. J. and Rangnekar, J.*) MAHADEO KRISHNA RUPJI, *In re.* **I.L.R. (1937) Bom. 432=167 I.C. 947=9 R. B. 343=38 Bom.L.R. 1286=A.I.R. 1937 Bom. 98.**

——**S. 31 (2)** — *Scope—Non-compliance — Order sanctioning sale by guardian—Omission to recite necessity—If fatal.*

Under S. 31 (2) of the Guardians and Wards Act the Court sanctioning a sale by a guardian of a minor should in the order granting sanction recite the necessity for the sale or the advantage to be derived from it; but the omission to do this is only an irregularity, and cannot invalidate the order or render the sale voidable. (*Broomfield and Tyabji, JJ.*) BALAJI VASUDÉO *v.* SADASHIV KASINATH. **I.L.R. (1937) Bom. 1=165 I.C. 530=9 R.B. 150=38 Bom. L.R. 796=A.I.R. 1936 Bom. 389.**

GUAR. & WARDS ACT (1890), S. 35.

——**S. 34**—*Arrears of maintenance due to minor—Order issuing warrant against ex-guardian—Legality.*

An order issuing warrant against an ex-guardian for recovery of arrears of maintenance said to be due to the minor up to the date of his making over possession of the minor's estate to the new guardian is bad, when the ex-guardian has no property of the minor in his hand and has made it over to the new guardian and has submitted accounts. If on the accounts anything is found due from him to the minor, appropriate steps could be taken against him for the recovery of the said amount. (*R. C. Mitter, J.*) GOLAM KADER HALDAR *v.* MOHAMMAD ABDUL RASHID. **68 C.L.J. 68.**

——**S. 34 (d)**—*Court can record any definite finding as to exact amount due from guardian.*

Where a petition against a guardian states that a certain amount is due from the guardian and the Court finds that the exact amount due is something different,

Held, that Court can record any definite finding as to exact amount due from guardian. (*Rowland, J.*) JAGARNATH LAL *v.* LAL BABU. **164 I.C. 282=9 R.P. 104=1936 P.W.N. 805 =17 Pat.L.T. 756=A.I.R. 1936 Pat. 447.**

——**S. 34(e)**—*Orders under—Force and operation of—Minor attaining majority.*

All orders passed under the provision of S. 34 (*e*) are temporary orders, having no effect after the owners of the estate attain majority. Once the minor attains majority, the Court is *functus officio* and the late ward is empowered himself to cancel or vary the arrangements made by the temporary orders which were passed during his minority. 5 C.W.N. 207, Dist. (*Middleton, J.C. and Almond, A.J.C.*) HABIBULLAH KHAN *v.* MT. PIARI JAN. **161 I.C. 41= 8 R. Pesh. 152=A.I.R. 1936 Pesh. 34.**

——**S. 35**—*Security bond by guardian securing immovable property for due performance of duties—Breach—Assignment of bond by Court to newly appointed guardian—Assignment by latter again to ward on latter attaining majority—Suit by latter to enforce bond—Competency —T. P. Act, S. 6 (e)—Mere right to sue.*

Where a person appointed as guardian of a minor under the Guardians and Wards Act executes a security bond in favour of the Court undertaking to "duly account for all the movable property and for all the money which he shall receive on account of the movable and immovable properties of the minor and the rents, profits and other incomes thereof at such periods as the judge shall appoint and to duly pay or dispose of the balances in his hands," and to be liable for a certain amount of money in default of the due performance of his duties as guardian, making his immovable properties security for the amount in addition to his personal liability, the bond is conditioned for the due performance of the duties of the executant as guardian. The obligation to pay comes into force the moment there is failure to account for the monies received by the guardian. If as the result of the engagement of the bond not being kept up and of the failure of the guardian to account for the monies, the Court assigns the bond under S. 35 of the Guardians and Wards Act, what the assignee gets is not a mere right to sue but a

right to enforce a liability under the bond which has accrued due, and when the liability is also secured by a charge or mortgage of immovable property, the charge or mortgage is also assigned along with the right to enforce the liability. The assignee under S. 35 is entitled to enforce the liability and the charge or mortgage therefor as if the bond has been executed in his favour. When a newly appointed guardian of the ward takes an assignment of the security bond executed by a previous guardian, who has failed to discharge his duties as guardian, the assignment is in trust for the ward who is entitled to the beneficial interest under the bond. The assignee is a trustee for the ward and is bound to surrender the property to the ward as soon as his office of trusteeship ceases. When the assignee guardian assigns the bond to the ward on the later becoming a major, that assignment is only in fulfilment of the duty the assignee is under to hand over all the property of the ward to the latter. Such an assignment is perfectly valid and entitles the ward to sue on the bond and to enforce its terms. (*Pandrang Row and Venkataramana Rao, JJ.*) MUTHURAMA AYYAR *v.* KRISHNA AYYAR. **179 I.C. 55=11 R.M. 513=1938 M.W.N. 379=A.I.R. 1938 Mad. 829.**

———**Ss. 39 and 8**—*First cousin of minor—Right to apply for removal of guardian.*

A first cousin, once removed, of a minor comes within the terms of S. 8 (*b*) of the Guardians and Wards Act and is thereby entitled to make an application for the appointment of a guardian. The fact that he comes within the term of S. 8 is quite enough to make him personally interested within the meaning of S. 39 of the Act and he is, therefore, entitled to file an application for the removal of a guardian. The fact that he is at enmity with the guardian is immaterial. (*Henderson and Khundkar, JJ.*) SRIPAT SINGH DUGAR *v.* MOHINI SUNDARI. **I.L.R. (1939) 2 Cal. 440=185 I.C. 880=12 R.C. 420.**

———**S. 39**—Locus standi *to apply under.*

Where objections were taken to accounts filed by a guardian of a minor by his maternal uncle who presented a petition for the removal of the guardian and an inquiry of accounts was held.

Held, that inquiry could be held at the instance of such person as S. 39 permitted a Court to act in the matter of removal of a guardian on the application of any person interested. (*Rowland, J.*) JAGARNATH LAL *v.* LAL BABU. **164 I.C. 282=9 R.P. 104=1936 P.W.N. 805=17 Pat.L.T. 756=A.I.R. 1936 Pat. 447.**

———**Ss. 39 and 43**—Relative scope—Testamentary guardian—Removal—Directions and conditions as to discharge of duties—Powers of Court. *See* GUARDIANS AND WARDS ACT, S. 43. **71 M.L.J. 417.**

———**S. 39**—*Scope—Removal of guardian—Reasons for—Minor's preference—If a ground—Duty of Court to state reasons for removal.*

Courts removing guardians must, first of all, be satisfied that there are present one or more of the reasons for the removal of guardians set out in S. 39, and should expressly state what the reasons are which justify the order removing the guardian. The mere circumstance that the minor is sufficiently old to be able to express a

preference for one person over another for his guardian is no reason for removal of a guardian. (*Beasley, C. J. and Stodart, J.*) KUMARASWAMI GOUNDAN *v.* AYYA GOUNDAN. **165 I.C. 258=9 R.M. 222 (1)=1936 M.W.N. 373=A.I.R. 1936 Mad. 695.**

———**S. 39 (h)**—*Appointment of guardian not residing within local limits of jurisdiction—Discretion of Court.*

It is within the discretion of the Court to appoint a man who does not reside within the local limits of its jurisdiction as a guardian. There is no provision in the Guardians and Wards Act prohibiting the appointment of a person as a guardian who does not reside within the local limits of the jurisdiction of the Court. A plain reading of S. 39 shows that the Court has been given the power to remove a guardian who has ceased to reside within its local limits. The word "may" has been used and not "shall". But the converse proposition is not true. (*Almond, C.J. and Mir Ahmad, J.*) ABDUL JABBAR *v.* MOHD. DAUD KHAN. **188 I.C. 555=13 R.Pesh. 2=A.I.R. 1940 Pesh. 14.**

———**S. 41 (3)**—*Direction to deposit cash security—When permissible.*

Where the only object is to protect the minor's property the object can well be served by directing the discharged guardian to furnish solvent security for payment of any amount that may be found due on scrutiny of accounts. It is hard on a guardian, to be called upon to deposit a large amount in cash. (*Niyogi, J.*) ABAJI *v.* DAMODAR ABAJI. **1938 N.L.J. 302=176 I.C. 693=11 R.N. 68=A.I.R. 1938 Nag. 399.**

———**S. 41 (3) and (4)**—*Discharge of guardian—Discretion—If unfettered—If revisable.*

When the *quandom* guardian has complied with the directions of the Court under sub-S. (3), the Court has full discretion in the matter under sub-S. (4) of the Guardians and Wards Act to discharge him, if it thinks fit. In exercising such discretion the Judge is exercising a jurisdiction vested in him and as such it cannot be interfered with in revision. (*Leach, C.J., Varadachariar and Mockett, JJ.*) RAMACHANDRAN *v.* BALASUBRAMANIA AYYAR. **I.L.R. (1938) Mad. 667=47 L.W. 268=174 I.C. 376=10 R.M. 698=1938 M.W.N. 188=A.I.R. 1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.).**

———**S. 41 (3)**—*Power of Court.*

Under S. 41 (3), a Court cannot compel the guardian of a minor to pay to the minor any sum found due from the guardian after an enquiry into the accounts, and the only order which it could pass is for the payment of the balance on the accounts exhibited by the guardian. (*Collister and Bajpai, JJ.*) RANGNATH *v.* MURARI LAL. **58 All. 721=161 I.C. 493=8 R.A. 740=1936 A.W.R. 100=1936 A.L.J. 36=1936 All.L.R. 283=A.I.R. 1936 All. 179.**

———**Ss. 41 (3) and 45**—*Powers of Court under—If exercisable after termination of guardianship—Accounts filed prior to removal—If deemed to be passed.*

The power of a Court under S. 41 (3) of the Guardians and Wards Act to direct a guardian on termination of his guardianship to deliver any property belonging to the ward extends to monies belonging to the minor. S. 45 is not

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inapplicable to a guardian after his removal. In view of the above, it cannot be contended that the accounts filed by a guardian prior to his removal should be deemed to have been passed by the Court. (*Dhavle, J.*) MUNNI LAL *v.* MUKHTESHWAR PRASAD. **175 I.C. 173=4 B.R. 535=19 Pat.L.T. 485=10 R.P. 590 (2)=1938 P.W.N. 509=A.I.R. 1938 Pat. 398.**

———S. 41 (3) and (4)—*Ward not satisfied by accounts rendered by guardian—Duty of Court.*

Where the ward is not satisfied by the accounts rendered by the guardian, it is the duty of the Court to order an enquiry into the accounts. The Court cannot shirk its duty by suggesting a remedy by way of a separate suit in view of the provisions of S. 48 of the Act. (*Roberts, C.J. and Dunkley, J.*) ABDUL HAMID SIRKAR *v.* ABDUL JABBAR. **A.I.R. 1940 Rang. 246.**

———S. 41 (4)—*Applicability—Application by mother of minor under S. 39 to remove guardian and to appoint herself as guardian of minor's property—Order of discharge after checking accounts furnished by guardian—If one under S. 41 (4).*

When an application is made by the mother of a minor under S. 39 of the Guardians and Wards Act for removal of a guardian appointed under the Act and for appointing herself as guardian of the property of the minor, and the Court orders the guardian to be discharged on the ground that he had furnished proper accounts which were checked and found correct by the Court, the discharge must be deemed to have been granted under S. 41 (4) of the Act. (*Pandrang Row, J.*) RAMAYYA *v.* TULASAMMA. **165 I.C. 276 (2)=9 R.M. 222 (2)=1936 M.W.N. 1025=44 L.W. 441=A.I.R. 1936 Mad. 868=71 M.L.J. 658.**

———S. 41 (4)—*Application by guardian for discharge—Duty of Court.*

The proper thing for a Court when the guardian applies for a discharge, is to issue a notice to the minor. If the minor has no objection, the discharge may be given. If however he has any objections, the Court may look into them in a summary manner, and if it is satisfied *prima facie* that there is some force in the objections, it will refuse to declare the guardian discharged from his liabilities under S. 41 (4), and direct the minor to obtain redress by means of a suit. and the discharge will be given on the basis of the decision of the regular suit. (*Collister and Bajpai, JJ.*) RANGNATH *v.* MURARI LAL. **58 All. 721=161 I.C. 493=8 R.A. 740=1936 A.W.R. 100=1936 A.L.J. 36=1936 All.L.R. 283=A.I.R. 1936 All. 179.**

———S. 41 (4)—*Discharge of guardian—Course to be adopted.*

Where a guardian of property has been appointed, on the minor coming of age, the proper course for a Court is either to refuse a discharge if it appeared that there was sufficient reason to keep open the question of the guardian's liability or to exercise its power under S. 41 (4) and discharge him if it considered that he has acted properly throughout and that no reasonable claim could be brought against him. (*Leach, C.J., Varadachariar and Mockett, JJ.*) RAMACHANDRAN *v.* BALASUBRAMANIA AYYAR. **I.L.R. (1938) Mad. 667=47 L.W. 268=174 I.C. 376=10 R.M. 698=1938 M.W.N. 188=A.I.R. 1938 Mad. 347=(1938) 1 M.L.J. 285 (F.B.).**

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———S. 41 (4)—*Discharge under—Legal effect of—Subsequent suit by minor for accounts against guardian—Maintainability—Proper remedy—Amendment of plaint as one to recover specific sum of money—Permissibility.*

An order discharging a guardian under S. 41 (4) of the Guardians and Wards Act must be regarded as discharging him from all his liabilities as guardian except in respect of any frauds committed by him which may subsequently be discovered. "Liability" referred to in the clause is not confined to liabilities to which the guardian is made subject by the Act but includes all the liabilities of the guardian under the general law to render an account of his management to the minor. When the guardian has rendered accounts and has been discharged by the Court under S. 41 (4), it is not open to the minor after becoming a major to sue the guardian praying that an account should be taken of the management. The suit, to be maintainable, should be framed as one for falsifying or surcharging the account already rendered by the guardian and not merely for taking an account. But if the plaintiff seeks to amend the plaint by making it as one for recovery of a specific sum of money lost by the plaintiff as the result of the fraud of the guardian while managing the estate, that should be allowed and the suit would then be maintainable. The plaintiff should therefore be permitted to amend the plaint on terms, and to pay the necessary additional Court-fee. (*Pandrang Row, J.*) RAMAYYA *v.* TULASAMMA. **165 I.C. 276 (2)=9 R.M. 222 (2)=1936 M.W.N. 1025=44 L.W. 441=A.I.R. 1936 Mad. 868=71 M.L.J. 658.**

———S. 42—*Resignation by guardian—Minor exceeding 18 years—Appointment of another guardian—If necessary.*

Where a guardian of the person and property of a minor has been appointed, the minor should be treated as a minor or infant and would not be able to enter into a contract or to transact any kind of business himself until the age of 21, and when a guardian so appointed has resigned, another guardian should be appointed to the person and property of the minor even though he has exceeded the age of 18 years. (*Agha Haidar, J.*) DALIP SINGH *v.* GIAN SINGH. **162 I.C. 716=8 R.L. 945=A.I.R. 1936 Lah. 142.**

———S. 43—*Applicability—Testamentary guardian—Person appointed executor disclaiming to be guardian—Order imposing conditions—If justified.*

S. 43 of the Guardians and Wards Act enables a Court to regulate by its order the conduct of persons either appointed or declared by the Court. A person who is appointed executor under a will and who disclaims that he is a guardian of the minor sons of the testator cannot be declared to be a guardian against his will by reason of S. 17 (5) of the Act. S. 43 is therefore inapplicable to him, and does not justify the Court to impose conditions on him in regard to his discharge of duties as guardian.

Obiter:—Under S. 39 which is wider in its scope than the S. 43, the Court may remove a guardian appointed or declared by the Court or a guardian appointed by a will. (*Venkatasubba*

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Rao and Cornish, JJ.) KRISHNASWAMI GOUNDAN *v.* PALANI AMMAL. **168 I.C. 223=9 R.M. 550=1936 M.W.N. 1042=44 L.W. 513=A.I.R. 1936 Mad. 843=71 M.L.J. 417.**

——**Ss. 43 and 32**—*Powers of District Judge—Mode of exercise.*

The exercise of powers by District Judges over the guardians appointed by them, should be kept within limits provided by law, and should not be wholly arbitrary, made before necessary enquiries are held in the manner provided by law. Orders which are arbitrary are liable to be set aside. (*Guha and Nasim Ali, JJ.*) RANI MOHINI SUNDARI *v.* DISTRICT JUDGE OF MURSHIDABAD. **169 I.C. 912=10 R.C. 110=64 C.L.J. 556=A.I.R. 1937 Cal. 424.**

——**S. 45**—Applicability—Removed guardian. *See* GUARDIANS AND WARDS ACT, SS. 41 (3) AND 45. **175 I.C. 173.**

——**S. 45**—Ex parte *order imposing fine—Legality.*

An *ex parte* order imposing a fine under S. 45 of the Guardians and Wards Act for not producing a minor in Court is bad. Courts should not take proceedings, especially of a punitive kind, without giving the party concerned notice to show cause against such proceedings. (*Skemp, J.*) MT. ALLAHDI *v.* ABDUL GHANI. **40 P.L.R. 532.**

——**S. 45**—*Order issued to late guardian to pay amount not admittedly due from him—Order not complied with—Power of Court to take disciplinary action.*

Under S. 45 of the Guardians and Wards Act, it is not open to the Court to take disciplinary action against a late guardian for non-compliance with an order issued to him to pay into Court an amount which was not admittedly due from him, but was arrived at by the Court itself on the basis of a report made by the present guardian, together with the Court's own inquiry into the correctness of that report. (*Srivastava, C. J. and Smith, J.*) ABDUL RAHMAN *v.* HUSAIN JAHAN. **13 Luck. 463=170 I.C. 497=10 R.O. 21=1937 O.L.R. 426=1937 O.W.N. 809=A.I.R. 1937 Oudh 463.**

——**Ss. 47 and 48**—*Provision for maintenance in order appointing guardian—If appealable.*

Where in an order appointing a guardian a provision is also made fixing the maintenance allowance for the minor, such a provision is not open to appeal. (*Stone, C.J. and Bose, J.*) MT. BHULI *v.* BAJABAI. **I.L.R. (1940) Nag. 221=11 R.N. 227=1938 N.L.J. 195=178 I.C. 461=A.I.R. 1938 Nag. 495.**

——**S. 47 (1)**—*Appeal—Application to Court by guardian for sanction for ward's marriage—Order on—Appeal—If lies.*

The performance of the marriage of the ward is one of the proceedings of a guardian referred to in S. 43 of the Guardians and Wards Act, and an order refusing to sanction the marriage of the ward upon the application of the personal guardian is appealable under S. 47 (1) of the Act. (*Macklin, J.*) DAHYABHAI *v.* BAI DIWALI. **184 I.C. 840=12 R.B. 200=41 Bom.L.R. 757=A.I.R. 1939 Bom. 366.**

——**S. 48**—*Suit for accounts—Court, if can fix time for filing.*

The Court has no authority to lay down a period of limitation different from that prescribed by the Limitation Act and has no power to compel the ward to institute a suit for accounts against

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the guardian within that period under the threat that failure to sue as aforesaid would result in discharge of the guardian. (*Roberts, C.J. and Dunkley, J.*) ABDUL HAMID SIRKAR *v.* ABDUL JABBAR. **A.I.R. 1940 Rang. 246.**

GUARDIANSHIP. *See also* HINDU LAW—GUARDIANSHIP.

GUJARAT TALUKDARS' ACT (VI OF 1888), S. 16—*Decision on—Appeal to District Judge from Talukdari Settlement Officer—Second appeal—If open.*

The decision of the District Court on appeal from the Talukdari Settlement Officer under S. 16 of the Gujarat Talukdars' Act is subject to second appeal to the High Court. (*Wadia and Wassoodew, JJ.*) ALABHAI VAJSURBHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=171 I.C. 536=10 R.B. 207=39 Bom.L.R. 444=A.I.R. 1937 Bom. 401.**

HABEAS CORPUS. *See also* CR. P. CODE, S. 491.

——Application by relatives of person wrongly confined as lunatic — Maintainability— Proper remedy. *See* LUNACY ACT, S. 33. **29 S.L.R. 431.**

——*Writ of—High Court's jurisdiction to issue—Single Judge of High Court—Powers and duties of—Extradition Act—Effect of.*

The Judges of the High Court have the same jurisdiction as the Judges of the old Supreme Court which was succeeded by it. Each Judge of the High Court is a tribunal to which an application for *habeas corpus* can be made and must hear them on the merits. The jurisdiction is of a peculiar and exceptional character as every Judge has it and not merely the High Court of which he forms a part. Further, the Judge has no option in the matter and cannot lawfully decline jurisdiction or refuse to entertain and determine applications made to him. It would be contrary to his oath of office to do so. The jurisdiction to issue a writ of *habeas corpus* has not been affected or taken away by any provision in the Extradition Act, and the *writ* can therefore be issued in proceedings taken in pursuance of the Extradition Act. (*Pandrang Rao, J.*) CROWN PROSECUTOR, MADRAS *v.* MAMMEN MAPPILLAI. **179 I.C. 917=11 R.M. 634=40 Cr.L.J. 297=1938 M. Cr.C. 354=1938 M.W.N. 1161=A.I.R. 1939 Mad. 115=(1939) 2 M.L.J. 135 (N.).**

——Writ of—High Court's power to issue prerogative writ after the passing of the Cr P. Code. *See* CR. P. CODE, S. 491. **43 C.W.N. 981=A.I.R. 1939 P.C. 213 (P.C.).**

HIGH COURT—Jurisdiction to grant injunctions apart from O. 39, R. 1 of C. P. Code. *See* C. P. CODE, O. 39, R. 1. **A.I.R. 1939 Cal. 642.**

HIGH COURTS ACT (1861), S. 9—Scope—If inconsistent with Cl. 10, Letters Patent (Patna)—Appeal from decision of single Judge in second appeal—Competency—Refusal of leave—Effect. *See* LETTERS PATENT (PATNA), CL. 10. **1939 P.W.N. 297=20 Pat.L.T. 404.**

HIGHWAY—Claim to right of way over village path—Suit by section of public—Maintainability—Proof of special damage--Necessity. *See* C.P. CODE, S. 91. **20 Pat.L.T. 414.**

——*Dedication — Extent of*— Puntha *within Zamindari used as public pathway—Trees of spontaneous growth—Right to—Mere non-enjoyment by Zamindar—If extinguishes right*—"Dis-

position" — Onus of proof — Limitation Act, Art. 142—*Madras Local Boards Act, Ss.* 112 *and* 163 (a).

A public right of way over land stands on the same footing as a public right of navigation over a river, and the soil of the highway is presumed to belong to the proprietor of the adjacent land. In the case of *puntha* within a zamindari estate, whether the *puntha* existed prior to the Permanent Settlement or came into existence after the Permanent Settlement the Zamindar, being the owner of the adjacent land, is also the owner of the soil of the *puntha* and of the trees spontaneously growing upon it, subject to the right of the public to use the *puntha* as highway. The fact that the pathway has come to be vested in a local authority under the Local Boards Act does not make any difference. In the case of land which the public of the neighbourhood is merely allowed to use as a pathway, the only inference which may be legitimately drawn from such user is that the dedication was of just what was required for a public pathway. Where a Zamindar claims the right to trees on a *puntha* which is within his Zamindari but which is used as a public pathway, the user by the public as a way cannot amount to any interference with his right to the trees. If, as owner of the soil he is in law entitled to the trees, mere non-enjoyment by him is not "dispossession" or discontinuance of possession within the meaning of Art. 142 of the Limitation Act. In such cases it is for those who plead extinction of the Zamindar's right by lapse of time to show that some one else has been enjoying the trees for the statutory period. (*Varadachariar, J.*) MAHARAJA OF PITHAPURAM *v.* CHAIRMAN, MUNICIPAL COUNCIL, COCANADA, **I.L.R. (1937) Mad. 147=165 I.C. 780=1936 M.W.N. 959=44 L.W. 491=9 R.M. 281=A.I.R. 1936 Mad. 919=71 M.L.J. 749.**

———*Dedication—Intention—Presumption from long user.*

Where the roofs of a shop have been used by pedestrians for access to the neighbouring public streets for a long time, such user does not necessarily raise a presumption as to dedication in every case. There must be an intention to dedicate, of which the user by the public is mere evidence and no more. A single act of interruption is of much more weight on the question of intention to dedicate than many acts of enjoyment. (*Bhide, J.*) CHUNI SHAH *v.* AMAR SINGH. **177 I.C. 966=11 R.L. 382=A.I.R. 1938 Lah. 97.**

———*Dedication—Presumption—Private passage leading to public road—Owner building houses on both sides and letting them out—Dedication of passage to public—If may be presumed.*

When a man builds a row of houses with a passage in front and the passage opens into an existing public highway at each end and he sells and lets these houses and thus invites others to come and use the passage, a presumption may legitimately be drawn that he intended to dedicate it to the public. The question, however, is one of fact and not of law and the Court is not bound to draw an inference, if on other grounds it thinks that the evidence adduced is not sufficient to make out a case of dedication. (*Mukherjea, J.*) MONDAKINI DEBI *v.* SAILENDRA NATH MUKHERJI. **43 C. W.N. 83.**

———Highway authority—Liability for mere non-feasance. *See* TORT—HIGHWAY AUTHORITY. **1939 A.W.R. (H.C.) 126=1939 A.L.J. 101.**

———Obstruction—Suit for establishing right of way and for removal of obstruction—Maintainability—Proof of special damage—Necessity. *See* C. P. CODE, S. 91. **(1939) 1 M.L.J. 392.**

———*Obstruction to public street—Suit for injunction—Proof of special damage—If necessary.*

Where a person institutes a suit for declaration that a particular street is a public street and that the defendants have obstructed it, praying for a perpetual injunction that the defendants should not obstruct the street, the plaintiff must establish that he is entitled to use a public highway which has been obstructed by the defendant and that he is inconvenienced by the obstruction. It is not necessary for him to prove that he has been inconvenienced in excess of any other member of the public who may have the right to use the public highway or that he has suffered some special damage of a kind not common to the public. So long as he can establish an injury, whether it is special injury to him or in common with the other members of the public who are entitled to use the highway, he is entitled to maintain his suit for the removal of the obstruction. 16 Lah. 517, Foll. (*Jai Lal, J.*) GHULAM RASUL KHAN *v.* ALI BAKHSH. **161 I.C. 457=8 R.L. 755=A.I.R. 1935 Lah. 132.**

———*Obstruction to road—Right to sue—Proof of special injury—If necessary.*

A person is not entitled to maintain a civil suit in respect of an encroachment on a public road without proof of special injury. (*Srivastava, C. J.*) SITA RAM *v.* PUTTU LAL. **13 Luck 444=170 I.C. 495=10 R.O. 13=1937 O.L.R. 425=1937 O.W.N 819=A.I.R. 1937 Oudh 456.**

———*Private street—Persons having wall facing street—Right to make openings in wall.*

Where a street which is the private property of an individual is accessible to the public, any one has a right to make openings in his own wall facing such a street. Hence the owner of such street cannot obtain injunction restraining such person from making such openings. (*Skemp, J.*) LACHHMI NARAIN *v.* NANAK CHAND. **179 I.C. 762=11 R.L. 628=A.I.R. 1938 Lah. 846.**

———Procession — Right to conduct in public street and before mosque. *See* RELIGIOUS PROCESSION. **1938 M.W.N. 119.**

———*Public thoroughfare—Encroachment on—Suit for removal—Right of person living in the neighbourhood—Special damage—If to be proved.*

It has been recognised in principle that a person in the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action, irrespective of proof of special damage; the real principle is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) PAHLAD MAHARAJ *v* GAURI DUTT MARWARI. **171 I.C. 933=10 R.P. 267=4 B.R. 87=18 Pat.L.T. 737=A.I.R. 1937 Pat. 620.**

———*Right of access and of frontage in respect of land abutting public road—Interference with—Actionability.*

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An owner of land abutting on a public road is entitled to access to such road at any point where his land actually touches the road. This natural or common law right of access to the public road exists equally in the case of roads vested in a municipality, and is not automatically extinguished by reason of the fact that the Municipality under its statutory powers leases out a roadside strip of land. The owner has also the right of road frontage which should not be interfered with. Both the right of access and the right of frontage are valuable rights, and if anything is done by the Municipality with regard to the highway which tends to diminish the comforts of the owner of the abutting land the owner has an actionable claim against the Municipality. (*Dhavle, J.*) DWARKA PRASAD SINHA *v.* PATNA CITY MUNICIPALITY. **4 B R. 806=177 I.C. 315=11 R.P. 142=19 Pat.L.T. 511=A.I.R. 1938 Pat. 423.**

———*Right to perform religious festival on—If recognised by law—Rule to be observed.*

There is a right in India to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street. A religious festival does not stand on a different footing and the right to perform a religious festival on the highway is recognised by law. The right is of course subject to the directions of the Magistrate and the rights of the public, and it is for the Magistrate to regulate the order and manner of performance of the festival. (*Lakshmana Rao, J.*) MURUGAPPA MUDALI *v.* KUPPUSWAMI MUDALI. **180 I.C. 48=11 R.M. 648=1938 M.Cr.C. 278=1938 M.W.N. 839=48 L.W. 267=A.I.R. 1938 Mad. 819=(1938) 2 M.L.J. 375.**

———*Religious processions—Right to take out—Limitations.*

Persons of every sect are entitled to take out religious processions with appropriate observances along a highway provided they do not interfere with the ordinary use of the public or contravene the orders of the Magistrate or directions of the Police for the maintenance of peace. The right to take out religious procession along a highway is an inherent right and does not depend on the proof of any custom or long established practice, nor is it extinguished by mere abstention or non-exercise of it for a number of years. (*Nawal Kishore, C.J. and Ranjitmal, J.*) DHARMCHAND *v.* SAGURMAL. **1939 Mar.L.R. 39 (C.).**

———*Rights of public—Municipality proposing to sell portion of public street in front of plaintiff's shop—Plaintiff's right to sue for injunction.*

For owners of houses abutting on a public highway the question of frontage means a great deal, and if anything is done by those in whom the highway vests, which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comforts of the occupants of the houses, the owners have an actionable claim against them. Where therefore the Municipal Committee propose to sell a portion of a street in front of the plaintiff's shop for the purpose of building shops and the plaintiff has not merely got a frontage, but it is a frontage of more than usual value because his is the first shop in the Mandi which persons coming from the railway station to the main gate of the Mandi have to pass, the plaintiff is entitled to sue the Municipal Committee for an injunction restraining them from selling the portion of land. (*Blacker, J.*) KASTURI LAL SANT LAL *v.* MUNICIPAL COMMITTEE, JAGRAON. **187 I.C. 686=12 R.L. 483=41 P L.R. 548=A.I.R. 1939 Lah. 199.**

———*Rights of public—Right to use every part of public street.*

The public have a right to use every part of a public street, not merely the metalled portion in the centre. (*Blacker, J.*) KASTURI LAL SANT LAL *v.* MUNICIPAL COMMITTEE, JAGRAON. **187 I.C. 686=12 R.L. 483=41 P.L.R. 548=A.I.R. 1939 Lah. 199.**

———*Unrestricted common law right to the use of—Motor vehicles, if possess.*

It is not correct to say that the owner of a motor vehicle has a common law right to take it over any road, subject to compliance with a formality. Assuming that such a right did at one time exist or must be presumed to have existed, it is clear that that right was taken away by the Local Boards Act, unless the person who wished to use the highway got the permission to do so, from the local body having jurisdiction. (*Horwill, J.*) PRESIDENT, DT. BOARD, KISTNA *v.* LAKSHMAYYA. **177 I.C. 126=11 R.M. 252=1937 M.W.N. 1223 (2)=A.I.R. 1938 Mad. 227=(1938) 1 M.L.J. 391.**

———*Use as a public path—Presumption of dedication from long user.*

Where it is found that a path has been used as a public path from time immemorial, its dedication to the public as a public highway can be presumed from the long user which has been established; when there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court so far as it lawfully can, to clothe the fact with right. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

———Village path or lane—*Orasa* son—If public nuisance—Suit in respect of—Maintainability—Conditions—Special damage. *See* C. P. CODE, S. 91 AND O. 1, R. 8. **17 Pat.L.T. 842.**

———*Village pathway — If public highway or private way—Test—Dedication—Inference from user.*

Ways permitted to be used by a section of the public are private ways, generally having their origin in custom, but such ways can be converted into ordinary highways after user by the public in general; evidence in support of the public claim must be cogent, but the fact that a pathway does not join a public thoroughfare at either end does not militate against its public character. The material question is whether the public in general use the way as a pathway, or only the inhabitants of a village and of some of the other neighbouring villages. (*Fazl Ali and Meredith, JJ.*) BIBHUTI NARAYAN SINGH *v.* GURU MAHDEV ASRAM PRASAD SAHI. **19 Pat. 208=190 I.C. 46=6 B.R. 894=A.I.R. 1940 Pat. 449.**

———Village path—Obstruction—Right of action—Special damage—Proof—Necessity. *See* C. P. CODE, S. 91 AND O. 1, R. 8. **19 Pat. 208.**

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——Adoption.

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——*Adoption—Ante-adoption agreement—Validity.*

An agreement entered into by the natural guardian of a boy, taken into adoption by a widow under which the widow is to remain in possession of the property during her lifetime is valid, and does not affect the validity of the adoption. A.I.R. 1927 P.C. 139, Rel. on. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* SUMAT PRASAD. 58 All. 1019=164 I.C. 1047=9 R.A. 210=1936 A.W.R. 857=1936 A.L.J. 1237=1936 All. L.R. 834 =A.I.R 1936 All. 641.

——*Adoption — Ante-adoption agreement — Validity—Agreement by natural father that adoptee to have no rights in property during lifetime of adoptive parents and that adoptee should provide for maintenance of adoptive aunt who had no legal claim—Validity.*

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An agreement by the natural father of the adoptee which provides that during the lifetime of the adoptive father and adoptive mother or either of them the adoptee has no right of any kind in the property of the adoptive parents, and that the adoptee should provide for the maintenance of his adoptive aunt who had no legal claim against the property, is one which goes much beyond the disposition which is sanctioned by custom allowing the adoptive widow to enjoy the property during her lifetime and clearly curtails the rights of the adopted boy in the property. Such an agreement is invalid and cannot be given effect to. (*Rangnekar and Macklin, JJ.*) PEMRAJ MULCHAND *v.* RAJIBAI. 173 I.C. 367=10 R.B. 325=39 Bom. L.R. 1069=A.I.R. 1938 Bom. 63.

——*Adoption—Bombay School—Alienation by coparcener prior to adoption not supported by justifying necessity and in excess of share—Right of adopted son to challenge same.*

Under the Mitakshara as interpreted in the Bombay Presidency, an alienation by a coparcener of his share even if it is not supported by justifying necessity, and an alienation in excess of his share are binding on a subsequently adopted coparcener as they are on his own son. A son adopted subsequent to such alienation cannot challenge the same though invalid. (*Wassoodew and Sen, JJ.*) BASAWANTAPPA MALLAPA *v.* MALLAPPA. I.L.R. (1939) Bom. 245=182 I.C. 302=12 R.B. 7=41 Bom. L.R. 268=A.I.R. 1939 Bom. 178.

——*Adoption — Bombay School — Mother's power to adopt—How affected by the death of the son.*

If a son dies before attaining full legal competence and without leaving either a widow or a son or an adopted son, then the mother's power to adopt which was in abeyance during the son's lifetime revives, but the moment he hands the torch on to another, the mother can no longer retake it. Whether he has so done or not is a matter to be determined in each case, with reference to the state of affairs existing at the date of his death. The legal competency or otherwise of the person, to whom it is handed, is quite immaterial. (*Bose, J.*) BAPUJI *v.* GANGARAM. 180 I.C. 792=11 R.N. 396=1938 N.L.J. 476=A.I.R. 1939 Nag. 47.

——*Adoption—Burden of proof.*

Where a son-in-law is alleged to have been adopted, it is for the alleged adopted son to prove that he was in fact adopted. (*Darling, S. M. and Bomford, J.M.*) KANT LAL *v.* BANSI KHATIK. 1938 R.D. 442=1938 A.W.R. (B.R.) 233=1938 A.L.J. 66 (Supp.).

——*Adoption—Burden of proof.*

In the general case where it is sought to change the usual course of inheritance on the alleged ground of an adoption having been made, it is clearly upon the party setting up that title against the entrance of the legal heir to prove the adoption both as regards the power of the adopter to adopt and also as regards the fact of the adoption if it be questioned. (*Lord Macmillan*) LAL HARIHAR PRATAP BAKHSH SINGH *v.* BAJRANG BAHADUR SINGH. 31 S.L.R. 617=41 C.W.N.

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1126=1937 O.W.N. 776=1937 O.L.R. 391=1937 A.L.R. 616=3 B.R. 672=1937 P.W.N. 619=10 R.P.C. 29=1937 M.W.N. 810=1937 A.W.R. 982 =169 I.C. 551=39 Bom.L.R. 1014=46 L.W. 806 =1937 A.L.J. 1047=18 Pat.L.T. 901=A.I.R. 1937 P.C. 242=(1937) 2 M.L.J. 711 (P.C.).

——*Adoption — Ceremonies — Adoption of daughter's son by Brahmins in South India—* Datta homam—*If essential for validity of adoption.*

Among the Brahmins in South India, *datta homam* is not essential to the validity of an adoption of a daughter's son. Although the general rule is that *datta homam* is necessary among the twice-born classes, there is an exception to that rule based on a text of Yama in the case of a brother's son and a daughter's son. (*Leach, C.J. and Patanjali Sastri, J.*) SAMINATHA IYER *v.* VAGESAN. I.L.R. (1940) Mad. 98=12 R.M. 511 =185 I.C. 37=50 L.W. 270=1939 M.W.N. 827=A.I.R. 1939 Mad. 849=(1939) 2 M.L.J. 557.

——*Adoption—Ceremonies* — Datta homam— *Necessity in the case of twice-born classes—If to be simultaneous with giving and taking—Performance of* datta homam *subsequently — If relates back—Vadnagari Waries of Poona—If Sudras.*

For a valid adoption among the twice-born or regenerate castes, the ceremony of *datta homam* is necessary and there can be no doubt that the physical act of giving and taking is not by itself sufficient among those castes to constitute a valid adoption. *Datta homam* is essential unless the adoptive father and son belong to the same gotra. It is not, however, necessary that the *datta homam* ceremony should take place simultaneously with the glving and taking. It is sufficient if that is performed even after a considerable interval, and in such cases, the subsequent religious ceremony, when it is performed, relates back to the prior giving and taking. Vadnagari Waries of Poona are Vaishyas and thus belong to the twice-born castes, and are not Sudras. (*Wadia and Indarnarayan, JJ.*) HARIDAS KISANDAS *u.* NARAYANDAS. 188 I.C. 545=13 R.B. 1=42 Bom.L.R. 283=A.I.R. 1940 Bom. 181.

——*Adoption — Ceremonies — Dayabhaga — Giving and taking—If essential.*

Though as a general proposition under Dayabhaga law, acceptance is not necessary to constitute a valid gift, adoption is a very special form of gift and there cannot be an adoption without giving and taking. (*Ameer Ali, J.*) HARIDAS CHATTERJEE *v.* MANMATHA NATH. 160 I C. 332 =8 R.C. 423=A.I.R. 1936 Cal. 1.

[*On appeal*: I.L.R. (1937) 2 Cal. 265=41 C.W. N. 322].

——*Adoption — Ceremonies — Declaration of acceptance of child in adoption by adoptive mother —Necessity.*

Where performance of certain ceremonies together with the giving and taking in adoption are proved, the fact that the adoptive mother did not make a formal declaration of acceptance of the adopted boy does not vitiate the adoption. (*Hamilton, J.*) RAM NATH TEWARI *v.* BARE LAL. 184 I.C. 425=12 R.O. 117=1939 O.W.N. 905= 1939 O.A. 741=1939 O.L.R. 624= 1939 A.W.R. (C.C.) 220=A.I.R. 1940 Oudh 13.

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——*Adoption — Ceremonies — Giving and taking.*

The giving and taking ceremony is the essence of adoption and the law does not accept any substitute for it. Mere expression of consent or execution of a deed of adoption though registered but not accompanied by the actual delivery of the boy does not operate as valid adoption. (*Abdul Qayoom, C.J. and Wazir, J.*) PARASRAM *v.* PANJABOO. 40 P L.R. J. & K. 42.

——*Adoption—Ceremonies—Giving and taking —Evidence of—Presence of boy when Sub-Registrar questioned father and widow about execution of deed.*

In the case of an adoption by a registered deed, evidence that the boy was present at the time of the registration proceedings when the Sub-Registrar put to his father and the widow who adopted him the questions whether they had executed the deed, is sufficient to prove a giving and taking. (*Sir George Rankin.*) BIRADH MAL *v.* PRABHABHATI KUNWAR. I.L.R. (1939) Kar. 258=5 B. R. 631=181 I.C. 311=11 R P.C. 249=1939 O.L. R. 318=43 C.W.N. 842=1939 O W.N. 562=41 Bom.L.R. 1061=70 C.L.J. 377=1939 P.W.N. 891=A.I.R. 1939 P.C. 152 (P.C.)

——*Adoption—Ceremonies—Giving and taking —Necessity for—Adoption af orphan—Validity— Marwar.*

According to law now prevailing in Marwar the ceremony of giving and taking is not at all necessary and all that is required is a registered deed of adoption. Consequently the adoption of an orphan, if evidenced by a registered deed of adoption, must be held to be valid in Marwar. (*Nawal Kishore, C.J. and Ranjitmal, J.*) BAKTAWARLAL *v* GODAWARI. 1939 Mar.L.R. 30 (C.).

——*Adoption—Dancing girl—Adoption of girl —Legal consequences of—Adoptee's right of inheritance—Co-parcenary, if constituted—Right of adopted daughter to claim partition.*

The practice of adoption among devadasis in Madras has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of that elass to have a daughter. In such cases the adopted daughter inherits to her adoptive mother but it cannot be said that a coparcenary such as that recognised by the Hindu Law exists between the mother and the daughter, and the daughter cannot claim a share by partition of the property possessed by the adoptive mother on the ground that it is joint family property. (*Wadsworth, J.*) GANGAMMA *v.* KUPPAMMAL. I L.R. 1938 Mad. 789= 183 I.C. 680=12 R M 356=48 L.W. 919=1938 M.W.N. 1258=A.I.R. 1939 Mad. 139=(1938) 2 M.L.J. 923.

——*Adoption — Dancing girls—Ceremonies— Adoption of two daughters—Validity—Custom.*

No particular ceremony is necessary for an adoption by a devadasi and there is no legal objection to the adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community. (*Wadsworth, J.*) GANGAMMA *v.* KUPPAMMAL. I.L.R. 1938 Mad. 789=183 I.C. 680=12 R.M. 356=48 L.W. 919=1938 M.W.N. 1258=A.I.R. 1939 Mad. 139=(1938) 2 M.L.J. 923.

——*Adoption—Dancing girls — Adoption of minor girl for purposes of prostitution—Validity and effect of.*

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The adoption of a minor by a dancing girl for purposes of prostitution is not really an adoption at all, it is a mere use of certain forms and will confer no status on the person adopted. (*Wadsworth, J.*) GANGAMMA *v* KUPPAMMAL. I L.R. 1938 Mad. 789=183 I.C. 680=12 R.M. 356=48 L.W. 919=1938 M.W.N. 1258=A.I.R. 1939 Mad 139=(1938) 2 M.L.J. 923.

——*Adoption—Dattaka form—Construction of deed.*

Where an instrument executed by the adoptive father stated expressly that the adopted son was struck off from heirship of his natural father and became without concern with his natural father and came into the sonship of the adoptive father.

Held, that this was equivalent to an express declaration that the adoption was in the Dattaka form and not in the Kritrima form, and that as the declaration was made in the most solemn manner in a document witnessed by a large number of neighbours and friends, it would require very strong evidence to cast doubt upon the nature of the adoption. (*Sir Gerge Rankin*) MT. BINDA KUER *v.* LALITA PRASAD CHOUDHARY. 164 I.C. 340=1936 O.W.N. 813=38 Bom.L.R. 1256=9 R.P.C. 107=41 C.W.N. 161=3 B.R. 1=1936 O.L.R 510=1936 All.L.R. 829=1936 P.W.N. 681=17 Pat.L.T. 636=44 L.W. 546=A.I.R. 1936 P.C. 304 (P.C.).

——*Adoption—Effect of.*

Adoption does not sever the tie of the physical blood relationship but it completely transfers the adopted son to the adoptive family as regards legal relationship. Consequently a son who leaves his own family and enters by adoption into a different family ceases to be a *sapinda* of his former relations and *a fortiori* ceases to be a *gotraja sapinda* of any of them. (*Lord Macmillan.*) LAL HARIHAR PRATAP BAKHSH SINGH *v.* BAJRANG BAHADUR SINGH. 31 S.L.R. 617=41 C.W.N. 1126=1937 O.W.N. 776=1937 O L R. 391=1937 A.L.R. 616=3 B.R. 672=1937 P.W.N. 619=46 L.W. 806=1937 A.L.J. 1047=18 Pat.L.T. 901=10 R.P.C. 29=1937 M.W.N. 810=1937 A.W.R. 982=169 I.C. 551=39 Bom L.R. 1014=A.I.R. 1937 P.C. 242=(1937) 2 M.L.J. 711 (P.C.).

——*Adoption—Effect of — Adoptee having natural born son before adoption—Right to give such son in adoption after his adoption.*

There is no express text of Hindu law or judicial decision depriving an adopted son of his right to give away in adoption his natural-born son who was born to him before his adoption. Such a restriction cannot be imposed upon him. He can therefore validly give in adoption his natural born son, though he himself has already passed to another family by adoption. (*Beaumont, C. J. Wadia and Lokur, JJ.*) MARTAND JIWAJI *v.* NARAYAN KRISHNA. I.L.R. 1939 Bom. 586=184 I.C. 65=12 R.B. 148=41 Bom. L. R. 845=A.I.R. 1939 Bom. 305 (F.B.).

——*Adoption—Effect of—Divesting of estate—Adoption by widow inheriting son's property.*

An adoption made by a Hindu widow who had inherited property from her son, is valid. The adopted son, in such circumstances, would divest the adoptive mother of the estate which she inherited from her son. (*Mukherjea, J.*) HAMED GAZI *v.* SADAT ALI SIKDAR. 188 I.C. 479=12 R C. 6=71 C.L.J. 243=44 C.W.N. 443=A.I.R. 1940 Cal. 241.

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——*Adoption—Effect of—Divesting of estate—Limits of the rule.*

Whatever doubts there may be about divesting in certain cases, there can be none where the adoption is by 'the widow of a member of a Mitakshara joint family under an express permission of her husband's'. In such cases there is a divesting so far as the other co-parceners are concerned and the adopted son obtains whatever interests his adoptive father had at the date of his death. (*Stone, C. J. and Bose, J.*) JAGDISH *v.* PUNAMCHAND. 1938 N.L.J. 176.

——*Adoption—Effect of—Divesting of property vested—Principle underlying.*

A person in whom the property is vested after the death of the sole surviving member of a joint family, takes it subject to a defeasance in the event of an adoption by the widow of a predeceased member of the former joint family. The adopted son must get such interest as his father would have got had he been alive at the date of adoption. When a deceased coparcener's widow adopts a son to her husband, he acquires his father's interest notwithstanding that it lapsed to the survivors. It is the right of the adopted son and not the existence of the coparcenary that is the true criterion for determining the judicial effect of the adoption. (*Stone, C. J. and Niyogi, J.*) MT. DRAUPADI *v.* VIKRAM. I.L.R. (1938) Nag. 88=179 I.C. 82=11 R.N. 264=1938 N.L.J. 237=A.I.R. 1938 Nag. 423.

——*Adoption—Effect of—Family partnership—Adoption by widow—If relates back to husband's death.*

Ordinarily in Hindu Law the rights of an adopted son arise at his adoption. Even in the case of an adoption by a widow, though the adoption by her is for her husband still the adoptee's rights do not relate back to the death of her husband. But in the case of a trading partnership the adopted son takes the place of the deceased as from the date of his death, thus preventing its automatic dissolution. Under the ordinary law a firm of partnership dissolves upon the death of a partner and his heir does not *ipso facto* become its member since the continuance of a partnership depends upon the mutual consent and confidence of the partners. These incidents have however no application to an ancient family trade in which partnership continues unaffected by the deaths of old members and the births of new ones. As such a partnership of which the father was a member would continue in spite of his death, the son taking the father's place whether then living or posthumous. As such if a person was afterwards adopted his adoption relates back to the death of the father, so that the partnership is deemed to continue with him added as a partner from the date of the father's demise. (*Mahomed Ahmad Khan, C. J.*) KESRI SINGH *v.* HARKANWAR BAI. 187 I.C. 19.

——*Adoption—Effect of—Gayawals of Gaya—Custom—Gift of Gadi by sonless Gayawal—Effect—Donee—If adopted son of donor—If effects severance from natural family—Adoption in Dattaka form—Distinction.*

Among the Gayawals of Gaya, governed by the Mitakshara School of Hindu law, the custom is that when a sonless Gayawal makes a gift of his Gadi (or business) to another, the latter is usually

called his adopted son. The Gayawals are also known as the Pandas of Gaya whose main source of income is the Jatri business, and Jatri books maintained by them are considered to be property, A donee of the Gadi (family business) is known as the donor's adopted son. But such adoption is not, of course, an adoption in the accepted sense of the term under the Hindu Law, and it cannot have the effect of removing the "adopted" son from his natural family. It cannot, however,be laid down as a proposition that among the Gayawals the customary rules regarding adoption are so relaxed that a man may regularly be adopted into another family and still retain his interest in the estate of his natural father. An adoption among them in the Dattaka form cannot fail to have its usual consequence of loss of the rights of the adopted son in his natural family. (*Rowland and Chatterji, JJ.*) NARAYAN LAL *v.* BULAK LAL. **11 R.P. 558=180 I.C. 990=5 B.R. 516=20 P.L.T. 432=A.I.R. 1939 Pat. 416.**

———*Adoption—Effect of—Status of adopted son —Adoptive father cannot alter subsequently.*

Once a person is given in adoption he becomes transferred to the adoptive family and gets the status of an adopted son and the adoptive father cannot by any subsequent instrument alter the status that has been conferred on him as an adopted son. (*D. N. Mitter and Patterson, JJ.*) BHUPATI NATH CHAKRAVARTHY *v.* BASANTA KUMARI DEVI. **63 Cal. 1098=167 I.C. 713=9 R. C. 719=40 C.W.N. 1320=A.I.R. 1936 Cal. 556.**

———*Adoption—Essentials of Validity—Mere execution of adoption deed—Sufficiency—Admission in deed that adoption has been effected in* Shastraic *form—Effect of.*

To constitute a valid adoption under the Hindu law, the physical act of giving and taking is absolutely necessary. That is of the essence of adoption and the law does not accept any substitute for it. There cannot therefore be an adoption by the mere execution of a deed of adoption intending to make an adoption in future. Where however, a deed is executed by a person stating that an adoption had already taken place in the *Shastraic* form such an admission should be given its full weight, in the absence of evidence showing that the admission is untrue or was made by mistake or fraud or other vitiating circumstances, and the fact of adoption as well as its validity must be taken to be established. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) SUBBARAYAPPA *v.* PAPIAH. **17 Mys.L.J. 152=44 Mys.H.C.R. 124.**

———*Adoption—Evidence—Deed of adoption—Value.*

Adoption deed is not by itself proof of the adoption, but is an important piece of evidence. (*D. R. Norman.*) UMRAO *v.* MAHADEVI. **1937 A. M.L.J. 64.**

———*Adoption—Evidence of—Oral evidence—Sufficiency.*

An adoption deed, however, is not necessary to prove an adoption. It may be satisfactorily proved by oral evidence. (*Wadia and Norman, JJ.*) SANVEERANGOUDA *v.* BASANGOUDA. **184 I.C. 337=12 R.B. 161=41 Bom.L.R. 561=A.I.R. 1939 Bom. 313.**

———*Adoption*—Illatom *affiliation—Incidents of —Agreement of* illatom *affiliation—If to be embodied in regular detailed contract—Inference from facts.*

The incidents of the very widespread practice of *illatom* affiliation have not been completely establised by judicial decisions, these incidents should ordinarily be settled by evidence in the particular case. It is well recognised that an *illatom* affiliation is a ereature of agreement, but this does not mean that in every case of an *illatom* affiliation there must be a detailed contract embodying all the incidents of the arrangements in the particular case. The customary incidents being well known would not ordinarily be the subject of specific agreement. Although there may be no specific evidence of an actual agreement for an *illatom* affiliation. Such an agreement can be inferred from the proved facts of a case. (*Wadsworth, J.*) NAGI REDDI *v.* NANJUNDAPPA. **1940 M.W.N. 509=A.I.R. 1940 Mad. 761=(1940) 2 M.L.J. 30.**

———Adoption—Jains—Law governing — Presumption. *See* HINDU LAW—APPLICABILITY. **41 Bom.L.R. 760.**

———*Adoption—Jains—Widow—Power to adopt without authority from husband or consent of his collaterals—Rights of adopted son.*

It is well settled that a Jain widow can adopt without authority from her husband and the consent of his collaterals. This is common to all the Jains and there is no difference on this point among the different subjects of the Jains. Among Jains, adoption confers on the adopted son all the rights of a natural born son and he succeeds to all the property of his adoptive father. (*Zia-ul-Hasan and Hamilton, JJ.*) NEMI CHAND *v.* SANTOSH CHAND. **14 Luck. 483=11 R.O. 236=180 I.C. 129=1939 O.L.R. 124=1939 O A. 265=1939 O.W.N. 234=A.I.R. 1939 Oudh 113.**

———*Adoption—Lingayats—Law applicability—Theory of spiritual benefit conferred by adoption —If prevails.*

The ordinary Hindu Law is presumed to apply to Lingayats, except in so far as it is shown that they have superseded it by their customs. In the absence of evidence to the contrary, it must be assumed that the ordinary Hindu notions with regard to adoption (that an adoption confers spiritual benefits on the deceased ancestors of the adopted son) also prevail among Lingayats. (*Wadia and Divatia, JJ.*) LINGAPPA RAYAPPA *v.* KADAPPA BAPURAO. **42 Bom.L.R. 832=A.I.R. 1940 Bom. 345.**

———*Adoption—Power to adopt—Mother and sister.*

According to Hindu Law, only a wife can adopt to her husband and no other female can adopt to any other male. Thus a mother cannot adopt to her son nor a sister to her brother. Similarly the authority to adopt can be given to the widow alone and not to any other person. (*Sukhdeo Narain, J.*) KALYANDUTTA *v.* ASKARAN. **1939 Mar.L.R. 155 (Civ.).**

———*Adoption—Prior gift by adoptive father—Validity as against adopted son—Adoption and gift part of same transaction—Validity of gift—Test—Point of time to be considered.*

It is competent to a sole absolute owner under the Hindu Law to alienate his property before making an adoption, and the subsequently adopted son cannot repudiate the transaction. Any dis-

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position of property made by the adoptive father before the adoption cannot be challenged by the adopted son. If a deed of gift is executed and passed by the adoptive father before the adoption takes place,it would be binding on the subsequently adopted son, but if the gift deed is passed subsequent to the adoption, it would not be binding on the adopted son and would be voidable at his instance. It is the ceremony of giving and taking that creates the status of the adopted son and not the passing of the adoption deed which is merely the evidence of adoption. If the deed of gift is passed before such ceremony of adoption, it would be valid, if it is passed subsequent to that, the gift can be challenged by the adopted son. (*Divatia. J.*) KAMALABAI *v.* PANDURANG. **40 Bom.L.R. 428=176 I.C. 161=11 R.B. 23=A.I.R. 1938 Bom. 318.**

———*Adoption—Proof.*

The fact that the alleged adopted son did not perform the *sapinda* for the adoptive father and that he performed the *sapinda* for his natural father is a circumstance against the alleged adoption. (*Lord Blanesburgh.*) LAL DURGA BAKHSH SINGH *v.* BRIJ RAJ KUAR. **31 S.L.R. 517=168 I.C. 993=9 R.P.C. 343=1937 A.L.R. 512=1937 O.L.R. 361=3 B.R. 589=1937 A.W.R. 1054 =1937 O.W.N. 641=A.I.R. 1938 P.C. 40 (P.C.).**

———*Adoptions—Rights of adopted son.*

The rights of an adopted son accrue on the date of adoption, nevertheless he is entitled to challenge alienations made by a limited owner prior to his adoption. (*Stone, C.J. and Niyogi, J.*) MST. DRAUPADI *v.* VIKRAM. **I.L.R. (1938) Nag. 88=179 I.C. 82=11 R.N. 264=1938 N.L.J. 237=A.I.R. 1938 Nag. 423.**

———*Adoption—Rights of adopted son—Adoption not validly made—Rights in natural family—If lost.*

A person who is not validly adopted does not lose his rights in his natural family. (*Derbyshire, C.J. and D. N. Mitter, J.*) HARIDAS CHATTERJEE *v.* MONMOTHO NATH MULLICK. **I.L.R. (1937) 2 Cal. 265=41 C.W.N. 322.**

———*Adoption—Right of adoptee to challenge antecedent partition.*

(*Beaumont, C. J.*) An adopted son cannot challenge a partition effected before he was adopted. (*Beaumont, C.J. and Wassoodew, J.*) CHANBASAPPA *v.* HUCHAPPA. **180 I.C. 295=11 R.B. 292=40 Bom.L.R. 1185=A.I.R. 1939 Bom. 47.**

———*Adoption—Share of adopted son—Natural son born after adoption.*

An Adopted son on partition between him and the after-born natural son takes one fourth of the estate. (*Nawalkishore, C.J., Ranjitmal and Sukhdeonarain, JJ.*) JASWANTSINGH *v.* KUSALSINGH. **1940 Mar.L.R. 114 (Civ.).**

———*Adoption—Subsequent birth of son to adoptive father—Share of adopted son in father's property as against after-born son—Partible and impartible property—Distinction.*

In Western India, both in the districts governed by the Mitakshara and those specially governed by the authority of the Vyavahara Mayukha; the right of an adopted son, where there is one legitimate son born after the adoption, extends

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only to a fifth share of the father's estate on the principle that the adopted son takes a fourth of the legitimate son's share. So far as impartible property is concerned, namely, watan property, the after-born son is exclusively entitled to succeed to the watan property as he has precedence over the adopted son. (*Beaumont, C.J., Rangnekar and Wadia, JJ.*) SAHEBGOUDA *v.* SHIDDANGOUDA. **I.L.R. (1939) Bom. 314=181 I.C. 803=11 R.B. 353=41 Bom.L.R. 333=A.I.R. 1939 Bom. 166 (F.B.).**

———*Adoption—Validity—Adoption of brother's daughter's son—Bengal.*

The adoption of a brother's daughter's son is invalid under the Hindu Law as current in Bengal. It is a general rule of Hindu Law that there can be no valid adoption unless a legal marriage is possible between the person for whom adoption is made and the mother of the boy who is adopted in her maiden state. (*Derbyshire, C.J. and D. N. Mitter, J.*) HARIDAS CHATTERJEE *v.* MONMOTHO NATH MULLICK. **I.L.R. (1937) 2 Cal. 265=41 C.W.N. 322.**

[On appeal from: **160 I.C. 332=8 R.C. 423=A.I.R. 1936 Cal. 1.**]

———*Adoption—Validity—Dancing girl—Adoption of daughter by.*

The adoption of a daughter by a dancing woman of the prostitute class is valid, if the object of the adoption is not to bring the adoptee up to lead the life of a prostitute. Prostitution is neither an essential condition nor a necessary consequence of such an adoption, but is only an incident due to social influences. The adoption of a daughter by a dancing girl cannot by itself, without anything more being proved, be said to offend against public policy. Where a dancing girl adopts a daughter with the intention of marrying her to a man and not with the intention of bringing her up to lead the life of a prostitute, the adoption is valid and has to be upheld. (*King and K. S. Menon, JJ.*) VEERANNA *v.* SARASURATNAM. **163 I.C. 149=8 R.M. 1094=1936 M.W.N. 555=43 LW. 755=A.I.R. 1936 Mad. 639=71 M.L.J. 53.**

———*Adoption—Validity—Daughter succeeding as heir to father—Subsequent adoption by predeceased son's widow—Right of adopted son—Bombay Presidency.*

Where a daughter succeeds as heir of her father, on the death of her mother who had a widow's estate the vesting of the property in the daughter does not extinguish the right of a predeceased son's widow to adopt, a right which is co-extensive with her duty to provide a son for her husband. An adoption by the son's widow in such circumstances would be legal and valid and the adopted son would be entitled to the estate of the last male holder as a nearer heir than the daughter. (*Barlee and Sen, JJ.*) UMABAI BHAGWANT *v.* NANI MAHADEV. **60 Bom. 102=162 I.C. 133=8 R.B. 382=38 Bom.L.R. 100=A.I.R. 1936 Bom. 135.**

———*Adoption—Validity of—Grant out of impartible watan lands to younger son for maintenance—Death of grantee without male descendants—Reversion to senior branch—Adoption by widow of grantee—Divesting of estate.*

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Where lands which formed part of impartible watan lands were granted to an younger son for his maintenance, and on his death without male descendants reverted to the senior branch, an adoption made by the widow of the grantee is valid and the adopted son is entitled to the estate of the grantee. 46 I.A. 97, foll. (*Broomfield and Macklin, JJ.*) DUNDOOBAI *v.* VITHALRAO. **60 Bom. 498=162 I.C. 780=8 R.B. 422=38 Bom.L.R. 193=A I.R. 1936 Bom. 182.**

——*Adoption—Validity—Inquiry into motives—Relevancy.*

Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive as this result is bound to arise in each case of an adoption. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* SUMAT PRASAD. **58 All. 1019=164 I.C. 1047=9 R.A. 210=1936 A.W.R. 857=1936 A.L.J. 1237=1936 All.L.R. 834=A.I.R. 1936 All. 641.**

——*Adoption —Validity —Law in Marwar—Registered deed—If necessary.*

The Law in Marwar relating to adoptions is different from the law in British India. According to law in British India for an adoption to be valid it is not necessary to execute a deed and therefore there can be a valid adoption even in the absence of an adoption deed, But in Marwar, however, a law has been passed whereby the Courts are precluded from recognising an adoption unless the same is evidenced by a writing duly registered. (*Ranjitmal and Sukhdeonarain, JJ.*) FOJMAL *v.* MST. SINGARI. **1939 Mar.L.R. 60 (Civ.).**

——*Adoption —Validity —Orphan —Custom—Nattukottai Chetties.*

There is a custom among the Nattukottai Chetties of Madras which permits the adoption of an orphan. Such an adoption cannot be invalid among that community merely on the ground that the adoptee happens to be an orphan at the time of the adoption. But such an adoption will not satisfy the definition of a *Dattaka* adoption and an orphan boy when adopted will not, as a matter of law, apart from proof of custom, acquire all the rights which under the general Hindu Law are recognized in favour of a *Dattaka* son. (*Varadachariar and Burn, JJ.*) SUBRAMANIAM CHETTIAR *v.* SOMASUNDARAM CHETTIAR **59 Mad. 1064=164 I.C. 977=9 R.M. 189=1936 M.W.N. 774=44 L.W. 185=A.I.R 1936 Mad. 642=(1937) 1 M.L.J. 60.**

——*Adoption—Validity—Payment of money to widow.*

In order that an adoption deed may be declared invalid, on the ground of acceptance of pecuniary consideration by the widow the plaintiff must show that the deed had been executed on account of greed for money or bribe offered to the widow. 35 Bom. 169, Foll. (*Nawal Kishore, C.J. and Sukhdeo Narain, J.*) MST. RAMBHA *v.* RUGHNATH. **1939 Mar.L.R. 105 (Civ.).**

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——*Adoption—Validity of—Property vesting on death of sole surviving co-parcener in his sister—Subsequent adoption by widow of predeceased co-parcener—Validity and effect.*

Where on the death of the sole surviving co-parcener of a joint family, his property vests in his sister and the widow of a predeceased co-parcener subsequently makes an adoption, the adoption would no doubt be valid according to the law prevalent in Bombay. But the legal position as regards the effect of the adoption is that at the date of the adoption the position of the adopted son could not be that of a son who came into a joint family, the family having already lost its character as joint family when there was no other male member of the family except the sole surviving coparcener. That being so, the rights of the adopted son to succession must be postponed after those of the sister of the sole surviving co-parcener. The adopted son is not in a position to challenge any alienation made by the widow and cannot during the lifetime of the sister take his stand on his adoption for this purpose (*Barlee and Sen, JJ.*) DHONDI DNYANOO *v.* RAMA BALA. **60 Bom. 83=161 I.C. 849=8 R.B. 379=38 Bom.L.R. 94=A.I.R. 1936 Bom. 132.**

——*Adoption—Validity—Sister's son—Marwar.*

According to Hindu Law the adoptee must not be a boy whose mother the adopting father could not have legally married. But an adoption though prohibited under this rule may be valid if sanctioned by custom. Thus adoption of a sister's son is valid according to the custom prevailing in Marwar. (*Nawal Kishore, C.J. and Ranjitmal, J.*) BAKTAWARLAL *v.* GODAWARI. **1939 Mar.L.R. 30 (Civ.).**

——*Adoption — Validity — Son of outcaste—Sudras—Ex-communication of member by head priest—Adoption of son of ex-communicated person—If invalid.*

Degradation under the Hindu Law, according to the sages, depends for its degree upon the gravity of the offence by reason of which it is brought about. It is only the most heinous form of degradation that is stated to be punishable by expulsion from caste. When degradation of such a degree has been incurred, the person may be expelled from the caste, and if so expelled he is considered to be dead. But the ex-communication of a father does not *ipso facto* involve the ex-communication of his son so as to invalidate an adoption of that son by another. A deed of ex-communication must be strictly scrutinised and construed. A Sudra was ex-communicated by the head priest of the community for the alleged offence of not holding social intercourse with the village priest and of being the root of increasing communal enmity and thus disobeying the orders of the head of religion. The document of ex-communication referred only to the person ex-communicated, and forbade intercourse with him "until the said point has been cleared up." The outcasted person gave his son in adoption.

Held, (1) that the ex-communication of the person concerned did not affect the capacity of his son in respect of being given in adoption; (2) that the ex-communication was not in such terms as to fall within the higher grade of ex-com-

munication and could not have the grave effect, in regard to civil rights, of preventing the son of the person ex-communicated from being given in adoption; and (3) that there was no objection to the validity of the son's adoption on the ground that the father was not capable of giving him in adoption, as an adoption in the community involved no religious ceremony. (*Barlee and Tyabji, JJ.*) NEELAWA *v.* GURSHIDDAPPA. 39 Bom.L.R. 211=168 I.C. 821=9 R.B. 404=A.I.R. 1937 Bom. 169.

———*Adoption—Who can adopt—Right of unmarried man.*

It is not necessary for the validity of an adoption that the adopter should have been married. (*Bomford, J.M.*) RAJ NATH PANDE *v.* BENI MADHO PANDE. 1938 R.D. 328=1938 A.W.R. (B.R.) 172.

———*Adoption—Who can be adopted—Sister's son—Validity among Desastha Brahmins of Belgaum in Bombay—Custom as to.*

There is a well recognised custom prevalent among the Desastha Brahmins in the Belgaum District of the Bombay Presidency, under which the adoption of a sister's son is valid. (*Broomfield and Macklin, JJ.*) DASO VENKATESH *v.* RAMCHANDRA RANGO. I.L.R. (1938) Bom. 810=179 I.C. 326=11 R.B. 248=40 Bom.L.R. 960=A.I.R. 1938 Bom. 456.

———*Adoption—Who can be adopted—Sudras—Adoption of sister's son—Validity.*

It must be taken to be the rule among Sudras that the adoption of a sister's son is valid unless in the particular case with reference to the particular community there is evidence that it is prohibited. (*Broomfield and Macklin, JJ.*) KALAPPA *v.* SHIVAPPA. 39 Bom.L.R. 1282=173 I.C. 891=10 R.B. 404=A.I.R. 1938 Bom. 132.

———Adoption—Widow—Absence of sapindas—Widow if can adopt of her own volition. *See* HINDU LAW—ADOPTION—WIDOW—MADRAS PRESIDENCY A.I.R. 1938 P.C. 34 (P.C.).

———*Adoption—Widow — Adoption by—Death of adopted son unmarried—Second adoption by widow subsequently—Validity—If divests estate vested in widow.*

Where on the death of an aurasa or adopted son the estate which has descended to him from his father vests in his mother as his heir, and she makes an adoption to her deceased husband, the estate vested in her would be divested and the adoption would be valid. *V* died in 1890 leaving his widow who was shortly expecting a child. Shortly before his death he orally authorised his wife to make an adoption in case the child she was expecting should prove to be a girl. Some time after *V's* death, the widow was delivered of a still born female child. Some months later the widow adopted in 1891, one *P* who lived to become a major but shortly afterwards was murdered in 1907 while still unmarried. In 1926, the widow made a second adoption to her deceased husband.

Held, that the adoption was valid. (*King, J.*) PATTU ACHI *v.* RAJAGOPALA PILLAI. 1940 M.W.N. 847=A.I.R. 1940 Mad. 923.

———Adoption—Widow—Assent of Sapindas—If confined to agnates of husband. *See* HINDU LAW—Adoption.

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———*Adoption — Widow—Assent of sapindas—Adoption with consent of remoter sapindas—Nearest sapinda refusing consent on ground of doubt as to widow having religious bent of mind—Propriety—Validity of adoption.*

An adoption made by widow with the consent of remote sapindas who are not shown to have any corrupt motives is valid notwithstanding that a nearer sapinda does not consent to the adoption for improper reasons. When the widow prior to the adoption seeks his consent and sends him a letter requesting his consent and stating that if he delayed and kept quiet as before, it would be taken as an indication of his consent, and the latter evades giving an answer or questions the motive of the widow in making the adoption, the consent given by the more distant sapindas is sufficient to validate the adoption. The allegation on the part of nearer sapinda that the widow is not acting from a spiritual motive cannot form a justifiable reason for refusing his consent to the adoption. (*Cornish and Varadachariar, JJ.*) HARI RAMAYYA *v.* VENKATACHALAPATI. 163 I.C. 90=8 R.M. 1087=43 L.W. 668=1936 M.W.N. 261=A.I.R. 1936 Mad. 460=70 M.L.J. 619.

———*Adoption—Widow—Assent of sapindas—Consent of husband's nearest agnates—Daughter's son not consulted or not consenting—Validity of of adoption.*

The only ground on which a daughter's son can really claim to be consulted in an adoption by a widow is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. Where the widow has received the consent of her husband's nearest agnates, the fact that the major son of her daughter was not consulted or did not consent would not invalidate the adoption made by the widow.

Per *Somayya, J.*—If both agnates and cognates coexist the agnates must certainly be consulted in preference to cognates. (*Leach, C.J. Krishnaswami Aiyangar and Somayya, JJ.*) SESHAMMA *v.* VENKATA NARASIMHA RAO. I.L.R. 1940 Mad. 454=188 I.C. 250=12 R.M. 820=1940 M.W.N. 393=51 L.W. 408=A.I.R. 1940 Mad. 356=(1940) 1 M.L.J. 400 (F.B.).

———*Adoption—Widow—Authority— Construction of will—Boy to be selected by executors—Power of widow—If restricted to adoption of boy selected by them.*

A clause of a will, which authorised the widow to adopt a boy, provided that after the testator's death the executors "shall be competent to select a boy of a good family in the brotherhood and have him adopted by my wife on my behalf".

Held, that there was some doubt as to the exact intention of the testator, and it was possible to contend that, thinking that his wife being young and inexperienced, would stand in need of help in finding a boy for adoption, he required the executors to assist her in choosing a boy, but did not intend to restrict her power to the adoption of a boy suggested by them. (*Sir Shadi Lal.*) RATTEN LAL *v.* BAIJ NATH. I.L.R. 1938 Lah. 1=46 L.W. 394=1937 O.W.N. 934=1937 A.L.R. 695=1937 O.L.R. 441=10 R.P.C. 68=1937 A.W.R. 956=3 B.R. 773=1937 M.W.N. 1211=

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1937 P.W.N. 857=169 I.C. 902=40 P.L.R. 1021 =A.I.R. 1937 P.C. 292 (P.C.).

——*Adoption—Widow—Authority to adopt—Construction—Will authorising widow to adopt a boy from testator's family or a boy belonging to the same gotra as himself—Adoption of boy outside gotra—Validity.*

A power to adopt given by a Hindu husband to his wife must be strictly pursued. Where a Hindu by his last will and testament gives his widow authority to adopt "a suitable boy from our family or a boy belonging to the same gotra as myself", it is not a strict conformance to that authority if the widow adopts a boy outside the gotra. An adoption of a boy not belonging to the same gotra is invalid though it may be that no boy of the said gotra is available. (*Pandrang Row and Venkataramana Rao, JJ.*) SUNDARASIVUDU *v.* ADINARAYANA SASTRI. **I.L.R. 1940 Mad. 233=189 I.C. 303=13 R.M. 237=1939 M.W.N. 994=50 L.W. 500=A.I.R. 1939 Mad. 909 =(1939) 2 M.L.J. 614.**

——*Adoption—Widow—Authority to adopt—Construction of power.*

Where a Hindu testator by his will confers a power upon his widow to adopt a son within 10 years of his death, from among his brother's sons the power is expressly limited and in accordance with the general principles applicable to powers, the express limitation must be strictly observed. Hence where the widow makes an adoption of one of her husband's brothers' sons more than 11 years after the testator's death, the widow is not acting in strict conformity with the authority given to her by the will, and as such the adoption is invalid. (*Lord Romer.*) BHUPENDRA MOHAN ROY *v.* PURNA SASHI DEBI. **66 I.A. 265=I.L.R. (1939) Kar.(P.C.) 382=I.L.R. (1939) 2 Cal. 486=5 B.R. 961=12 R.P.C. 64=70 C.L.J. 209= 41 Bom.L.R. 1159=1939 A.L.J. 878=1939 M.W.N. 1116=183 I.C. 199=1939 O.W.N. 722 =1939 A.W.R. (P.C.) 157=1939 O.L.R. 513=43 C.W.N. 1149=50 L.W. 377=A.I.R. 1939 P.C. 222=(1939) 2 M.L.J. 479 (P.C.).**

——*Adoption—Widow Authority to adopt—Presumption.*

Where a person admits the factum of adoption but disputes the existence of an authority in favour of the widow to adopt, the presumption is in favour of the authority and the person opposing must rebut it. (*Nawal Kishore, C.J. and Ranjitmal, J.*) BAKTAWARLAL *v.* GODAWARI. **1939 Mar.L.R. 30 (Civ.).**

——*Adoption—Widow—Authority to widow to adopt—Construction—Will by husband authorising adoption by pregnant wife in case latter gave birth to son and son died—Wife giving birth to daughter—Adoption by Widow—Validity of—Widow—If estopped from disputing validity of adoption.*

A Hindu testator who had a daughter two or three years old and a pregnant wife executed a will which *inter alia* provided that if she gave birth to a male child she should manage the property till that child attained majority and then make it over to him. It also provided that if the wife gave birth to a female child, she was to be married in the same manner as was provided for the existing daughter in a previous clause of the will. Another clause in the will ran as follows: "If a male child be born but if it does not survive

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my wife, she is to adopt a boy of her choice etc." It turned out that the wife give birth to a daughter, and this daughter as well as the first daughter died shortly afterwards. The widow then adopted a boy purporting to do so under the authority conferred on her by the will.

Held, that the events which happend subsequent to the death of the testator could not affect the construction of the will, and that in the events which happened the widow had no authority to adopt, and the adoption was therefore invalid.

Held further, that the widow was not estopped from contending that the adoption was invalid, in the absence of any representation of oral authority to adopt apart from the will. (*Varadachariar and Abdur Rahman, JJ.*) NARASARAJU *v.* SATYAVATAMMA. **182 I.C. 715=12 R.M. 133= 1939 M.W.N. 13=48 L.W. 908=A.I.R. 1939 Mad. 187=(1939) 1 M.L.J. 75.**

——*Adoption—Widow—Authority—Grant of, by husband—Age of discretion.*

In Oudh the age of discretion is 16 years, and a person who has attained the age of 17 can, therefore, give a valid permission to his widow to adopt. (*Thomas, J.*) MATA BAKSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

——*Adoption—Widow (Bombay school) —Authority—Discretion by husband to adopt a named boy—If a prohibition against adoption of any other boy.*

It appeared from the will executed by the husband directing his wife to take a particular boy in adoption after a particular period, that the dominating idea or object of the testator as expressed in the will was that there should be an adoption without fail for certain reasons explained by him. There was no direction either explicitly made or clearly intended to limit the discretion of the widow in case the adoption of the boy named was impossible and the widow adopted another boy after expiry of the period mentioned in the will and after refusal of the mother of the boy named by the testator to give him in adoption.

Held, that the adoption was not invalid. A.I.R. 1922 P.C. 216, Rel. on. (*Lord Roche*) JAGANNATH RAO *v.* RAMBHOROSA. **38 Bom.L.R. 776= 1936 A.L.J. 874=1936 A.W.R. 746=40 C.W.N. 1125=9 R.P.C. 32=64 C.L.J. 13=1936 M.W.N. 942=163 I.C. 1=44 L.W. 120=1936 All.L.R. 592=1936 O.L.R. 359=1936 P.W.N. 590=A.I.R. 1936 P.C. 201=71 M.L.J. 309 (P.C.).**

——*Adoption—Widow—Consent of sapinda—Subsequent revocation of consent by Sapinda—If justified.*

When a sapinda on a dispassionate consideration of the question once gives his consent to an adoption by a widow, he cannot arbitrarily or capriciously withdraw it afterwards. To hold that the discretion in the exercise of which the sapinda gives his consent, necessarily carries with it a power to revoke it, is contrary to the spirit of Hindu Law which treats a sapinda's consent as amounting to an expression of opinion that the adoption conduces to the spiritual benefit of the deceased person.

Quaere.—Whether the consent can be revoked or withdrawn for justifiable reasons? (*Venkatasubba Rao, O.C.J., Varadachariar and Horwil, JJ.*) SIVASURYANARAYANA CHETTY *v.* AUDINARA-

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YANA CHETTI. I.L.R. 1937 Mad. 347=166 I.C. 339=9 R.M. 364=1936 M.W.N. 1333 (2)=44 L.W. 876=A.I.R. 1937 Mad. 110=(1937) 1 M.L.J. 8 (F.B.).

———*Adoption—Widow—Co-widows — Authority to adopt—Construction—Will authorising co-widows to separately make adoptions—Adoption by junior widow—Absence of refusal by senior widow to adopt or of consent to such adoption—Effect on validity of adoption.*

A Hindu who had two wives died leaving a will which provided, *inter alia*, "if after my lifetime, both of you" (*i.e.*, the two wives) "do not agree to live together, dividing the said properties into two equal shares, you shall separately make adoptions". Shortly after the death of the testator the junior widow made an adoption without the consent of the senior widow who was alive but who did not object.

Held, that the intention to be inferred from the provision in the will was to authorise each of the widows to adopt according to the rules of Hindu Law, namely that the senior widow should have the right which would only pass to the junior widow if the senior widow refused to adopt or consented to an adoption by the junior widow. Since there was no such refusal to adopt or consent by the senior widow, the adoption by the junior co-widow must be held to be invalid. (*Wadsworth, J.*) BYRE GOWDU *v.* MUNIAMMAL. 187 I.C. 745=12 R.M. 747=50 L.W. 594=1939 M.W.N. 1170=A.I.R. 1940 Mad. 5=(1939) 2 M.L.J. 805.

———*Adoption — Widow — Co-widows — Preferential right—Waiver or relinquishment by senior widow of right of adoption in favour of junior widow—Validity—Junior widow not adopting in pursuance of relinquishment—Power of senior widow to adopt—Adoption by senior widow subsequent to relinquishment—Validity.*

As between co-widows under the Hindu Law, a senior widow has a preferential right of adoption, and a junior widow cannot adopt without the senior widow's consent; if she does the adoption is invalid. It is, however, competent for the senior widow to waive her preferential right or give her consent to an adoption by the junior widow, and if such adoption is made, it is valid and cannot be subsequently challenged by the senior widow or by a son adopted by her Consequently a transfer by way of relinquishment of the right of adoption by the senior widow in favour of the junior widow is perfectly valid and is not against Hindu Law or public policy and can be the subject-matter of a valid agreement between the widows, and enforceable as such irrespective of the fact that the junior widow has not made an adoption under the right which she gets by the senior widow's relinquishment. It has all the legal incidents of a valid and binding contract, especially when it is not merely executory but executed. Whether the relinquishment of the right of adoption by the senior widow takes place with or without consideration is immaterial, if such arrangement is arrived at by the free consent of the relinquishing widow. If the right is waived or passed on in favour of the junior widow, it is waived once for all and cannot be revived. There is nothing in Hindu Law against the extinguishment of such right, the power of continuing the line being still there, as

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it merely passes from one widow to the other. It cannot be contended in such a case that though the senior widow may be barred by personal estoppel, a son adopted by her would not be bound by such relinquishment. When the senior widow has no right of adoption left in her on account of a valid relinquishment, there can be no legal adoption by her, and there is consequently no question of her adopted son acquiring the status of a son at all.

Barlee, J.—A transfer of the right of adoption by a senior widow to her junior is recognised by the Hindu Law, and the senior widow cannot revoke the transfer—whether it be looked on as a gift or sale. There seems to be no principle of Hindu Law which runs counter to the ordinary rule that property sold or given away cannot be reclaimed at the will of the transferor. (*Barlee and Divatia, JJ.*) SADASHIV *v.* RESHMA. I.L.R. (1938) Bom. 84=173 I.C. 509=10 R.B. 345=39 Bom.L.R. 1115=A.I.R. 1938 Bom. 1.

———*Adoption—Widow—(Madras Presidency)—Implied authority—When to be inferred—Mere association of wife in an act of adoption by the husband—If an indication of an implied authority to make a second adoption—Assent of kinsmen—If refers only to agnates of husband—Absence of Sapindas—Power of widow to adopt of her own volition.*

Under the interpretation of the Mitakshara law, as generally accepted in the Madras Presidency an adoption by a widow would be valid only if made under the authority of the lady's husband, or failing that with the assent of his kinsmen. Though the requisite authority need not necessarily be express, yet in order to constitute an implied authority there must be circumstantial evidence of a cogent character. Where there is nothing to show that the husband ever contemplated a second adoption, or that he was prepared to leave the selection of another boy to his wife, the mere association of the wife in an adoption by the husband is no indication of an implied authority to her to make a second adoption if the first boy died in infancy. Further, as to the assent of the kinsmen, it cannot be held that the only kinsmen whose assent need be sought should be agnates of the husband nor can it be held that under the Madras law there would be any residuary power in the widow to adopt of her own volition in the absence of sapindas. (*Sir George Lowndes.*) BALASUBRAMANYA PANDYA THALAIVAR *v.* SUBBIA TEVAR. 65 I.A. 93=I.L.R. 1938 Mad. 551=32 S.L.R. 328=1938 M.W.N. 1266=1938 A.L.J. 215=4 B.R. 251=42 C.W.N. 449=10 R.P.C. 162=19 Pat L.T 169=1938 A.W.R. (P.C.) 62=66 C.L.J. 581=40 Bom.L.R. 704=47 L.W 110=1938 O.WN. 117=172 I.C. 724=1938 O.L.R. 61=1938 O.A. 54=1938 A.L.R. 77=A.I.R. 1938 P.C. 34=(1938) 1 M.L.J. 426 (P.C.).

———*Adoption—Widow—Invalid adoption — If bars second adoption.*

The existen e of an invalidly adopted son is no legal impediment to the subsequent adoption of another son by a Hindu widow. (*Wassoodew, J.*) RADHA HAMBIRRAO *v.* DINKARRAO. 39 Bom.L.R. 147=10 R.B. 11=169 I.C. 316=A.I.R. 1937 Bom. 208.

———*Adoption—Widow—Partition between two branches of joint family—One branch consisting*

of only one male member and widow of latter's paternal uncle—Adoption by widow—Validity—Right of adopted son to share in family property.

N, and *P*. who were sons of *B*, were members of a joint Hindu family along with the descendants of *B's* brother *V*. *P*. died in 1923, leaving a widow, and later on *N*. also died leaving a son. In 1932 there was a partition between *N's* son on the one hand and the descendants of *V*, who formed the other branch. *N's* son got a half share, which was made liable for the maintenance of *P's* widow, and the other branch took the other half share and the members of the latter branch continued to live joint as between themselves. In 1933, *P's* widow adopted the plaintiff who brought a suit against *N's* son as well as the other branch for a fourth share in all the properties of the family as they stood before the partition of 1932. *N's* son pleaded that the share which he took at that partition was his absolute property as he was the sole surviving coparcener of his branch and that the plaintiff as the adopted son of *P*. was not entitled to any share or interest therein.

Held, (1) that the plaintiff was not entitled to challenge the partition of 1932, which could not be re-opened; (2) that *N's* son on partition with the other branch in 1932 took the half share as joint family property and not as his absolute property, and though he and the widow of *P*. were the only members of the joint family, it could not be said that the co-parcenary had come to end, and that on the adoption of the plaintiff by *P's* widow, that adopted son, the plaintiff, was also entitled to share; (3) that the adoption of the plaintiff did not divest the estate from any body but only let in the plaintiff as a member of the coparcenary, and the plaintiff was therefore entitled to one-half of the share taken by *N's* son at the partition of 1923.

Wassoodew, J.—The adoption of the plaintiff by *P's* widow was valid to hold that a division among the surviving co-parceners could effectively bar the adopted son of a deceased coparcener from claiming a share in the family property would have the effect of frustrating the right of adoption of a widow of a deceased coparcener. (*Beaumont, C.J. and Wasoodew, J.*) CHENBASAPPA *v* HUCHAPPA. **180 I.C. 295=11 R. B. 292=40 Bom.L.R. 1185=A.I.R. 1939Bom. 47.**

———*Adoption — Widow—Powers of—Absence of authority of husband—Refusal of consent by sapinda—Adoption in spite of—Validity—Burden of proof that refusal was improper.*

Under the Mitakshara law as interpreted in the Province of Madras, a Hindu widow cannot adopt a son to her husband unless she has received authority from him or has received the consent of her sapindas. Where the nearest sapinda refuses his consent, and the widow makes an adoption in spite of the refusal, it must, in order to validate the adoption, be shown that the refusal of consent was from an improper motive. The burden of showing that the refusal was from an improper motive is on those who seek to validate the adoption. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) VAJJULA *v*. GOPALAKRISHNAMMA. **51 L.W. 566=1940 M.W.N. 470=(1940) 1 M.L.J. 779.**

———*Adoption—Widow—Powers of—Authority given by will—Suggestion as to boy to be adopted*

—Executors to remain in possession during minority of the adopted boy—Refusal of widow to adopt—Widow, if entitled to possession of properties—Will, if creates a trust in favour of the executors.

Where a Hindu widow was directed by the will of her husband to adopt a particular boy and if he was not available, any other suitable boy, and where the will further appointed executors to be in possession of the properties during the minority of the adopted boy, and the widow refused to adopt.

Held, that a Hindu widow could not be compelled to adopt however strong the direction of her husband might be, and there was none to deprive her of her interest in the property on the ground that she might change her mind subsequently. The contingency provided for in the will not having occurred the testator should be regarded as intestate and the widow would be entitled to receive the properties as an intestacy.

Held further, that the will did not create a trust in favour of the executors. (*Leach, C.J. and Madhavan Nair, J.*) VARADANARAYANA AYYANGAR *v*. VENGU AMMAL. **I.L.R. 1938 Mad 621=183 I.C. 813=12 R.M 372=1938 M.W.N. 1281 =47 L.W. 217=(1938) 2 M.L.J. 613.**

———*Adoption—Widow—Powers of (Bombay) —If inherent or if delegated by husband.*

Barlee, J.—A Hindu widow in Bombay in making an adoption is exercising a power which has been delegated to her by her husband; she has no inherent power to adopt a son to her deceased husband, (*Barlee and Divatia, JJ.*) SADASHIV *v*. RESHMA. **I.L.R. (1938) Bom. 84=173 I.C. 509=10 R.B. 345=39 Bom.L.R. 1115=A.I.R. 1938 Bom. 1.**

———*Adoption—Widow—Powers of (Bombay) —Limits to—Test of validity—Death of last male holder leaving widow and sister—Widow taking estate and subsequently re-marrying—Estate passing to sister—Subsequent adoption by widow of predeceased paternal uncle of last male holder—Validity—Effect of—If revives coparcenary—Property vested in sister—It becomes divested.*

(*Beaumont, C.J. and N.J. Wadia, J.*)—The widow of a deceased member of a Hindu joint family can adopt to her husband without obtaining the consent of her husband's relations. A Hindu widow's right to adopt is based on religious considerations, and is not affected by any considerations as to the vesting or divesting of property. Where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint family accordingly, and this principle applies although the coparcenary is a zamindari having the peculiar feature of being governed by the rule of lineal primogeniture. Where such an adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by the widow of a deceased coparcener, has not the effect of reviving the coparcenary and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. After the determination of the co-parcenary and after the property has become vested in his heir, a subsequent adoption by a widow of a predeceased co-

parcener is valid; but it will not have the effect of reviving the co parcenary or vesting the property in the adopted son to the exclusion of the heir of the last holder other than the widow herself.

Rangnekar, J.—Where a Hindu family is joint and undivided, a widow of a coparcener can make a valid adoption to her deceased husband without the consent of the surviving coparceners, unless she was prohibited expressly or impliedly by her husband from making an adoption and unless her power is at an end. A widow of a separated Hindu can always make a valid adoption to her husband unless prohibited expressly or impliedly by her husband and unless her power to adopt is at an end. Where the coparcenery is extinct and the last of the last surviving coparcener has passed by inheritance to his heir, the power of a widow of a predeceased co-parcener to adopt a son to her husband is at an end and she cannot make a valid adoption thereafter to her husband. There are limits to the exercise of the power of a widow to adopt a son to her husband, and when those limits are reached, the power comes to an end and can never be revived. Succession can never be in abeyance except in the case of a widow in a joint family who is *enceinte* at the time of the death of the last holder. The nearest heir succeeds as beneficial owner and becomes a fresh stock of descent, except in the case of those widows who take a widow's estate only. If an adoption is valid, it is valid for all purposes and the adopted son has all the rights of a posthumous son. Where, therefore, the co-parcenary has become extinct by the death of the last male holder and the estate has vested in his heir, the power of the widow of a predeceased coparcener to make an adoption to her husband comes to an end, and a subsequent adoption by her is invalid; nor will it revive the co-parcenary or divest the property from the heir in whom it has already become vested. Religious efficacy is not the sole test of the validity of an adoption by a Hindu widow. *S* who was the last surviving coparcener of a joint Hindu family died leaving a widow, *G* and a sister *A*. The widow succeeded to the estate, but on her remarriage afterwards, the estate passed to *A* as the next heir. The widow of a brother of the last holder, who had predeceased then adopted a son to her husband.

Held, (per *Beaumont, C.J. and N.J. Wadia, and Rangnekar, JJ., dissenting.*) that the adoption was valid, but did not divest the property from *A* in whom it had already vested or vest it in the adopted son. (Per *Rangnekar, J.*), that the adoption was invalid, and it did not divest the property already vested in *A*. (*Beaumont C.J. Rangnekar and Wadia, JJ.*) BALU SAKHARAM *v.* LAHOO SAMBHAJI. 39 Bom.L.R. 382=I.L.R. 1937 Bom. 508=10 R.B. 83=170 I.C. 393=A.I.R. 1937 Bom. 279 (F.B.).

———*Adoption—Widow—Powers of— Co-parcenary becoming extinct by partition—Widow of coparcener dying long before partition—Adoption by—Validity.*

On the extinction of a Hindu coparcenary by partition, the widow of a coparcener who had died long before such partition cannot make a valid adoption. There is then no undivided family into which the adopted son can be admitted by vitrtue of his adoption; and an adoption made by a widow in such circumstances is not valid. (*Rangnekar, J.*) HIRACHAND *v.* ROWJI SOJPAL. I.L.R. (1939) Bom. 512=184 I.C. 876 =12 R.B. 203=41 Bom.L.R. 760=A.I.R. 1939 Bom. 377.

———*Adoption—Widow — Powers of— Custom among Jains.*

By a custom prevailing among the Jains, a Jain widow is competent to adopt without authority from her husband or permission of his kinsmen. The widow possesses the right to adopt quite independently of the nature and extent of the widow's right acquired by her in the estate of her deceased husband and irrespective of the fact whether the property of her deceased husband, to which she succeeds, is ancestral or self-acquired. The nature of the property *i.e.*, whether it is self-acquired or ancestral, would affect the rights which the widow would acquire in it, but not the widow's right of adoption. The adopted son does not succeed to the property through the widow, but succeeds through the adoptive father, having the same status as that of a natural born son begotten by the husband, on his adopting widow. The adoption confers on the adopted son all the rights of a natural born son and he succeeds to all the property, ancestral as well as self-acquired or of the adoptive father. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* SUMAT PRASAD. 58 All. 1019=164 I.C. 1047=9 R.A. 210=1936 A.W.R. 857=1936 A.L.J. 1237=1936 All.L.R. 834=A.I.R. 1936 All. 641.

———*Adoption—Widow—Powers of—Death of one leaving widow—Daughter-in law re marrying —Power of mother to adopt.*

The power of a Hindu widow to adopt is not dependent in any way on the vesting or divesting of property. Her authority to adopt in a case where her husband leaves a son comes to an end only when the son dies after attaining full legal capacity to continue the line either by the birth of a natural born son or by adoption to him of a son by his widow. The test is whether these conditions exist at the time of the son's death. The mother's power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow. The fact that the widow left by the son re-marries does not give the mother a right to make an adoption after such re-marriage. If she makes an adoption, that would be invalid. (*Broomfield and Wassoodew, JJ.*) RAMCHANDRA NARAYAN *v.* MURLIDHAR YESHWANT. 173 I.C. 36=10 R.B. 305=39 Bom.L.R. 599=A.I.R. 1938 Bom. 20.

———*Adoption — Widow — Powers of—Joint family consisting of father and son—Death of son before father leaving widow and daughter—Death of father—Property inherited by widow of father —Subsequent adoption by son's wife—Validity—If divests property vested in father's widow—Rules.*

Where after the termination of the coparcenary by the death of the last surviving co-parcener, the widow of a predeceased coparcener makes an adoption, such adoption has not the effect of reviving the coparcenary and does not divest property from the heir of the last surviving coparcener (other than the widow), or those claiming through him or her. *N.* and his father *P.* were members of a Hindu joint family. *N.* predeceased his father leaving a widow *S* and a daughter. *N's*

mother died shortly thereafter, and *P.* then married a second wife, *A. P* died within a year of the marriage and the entire property was inherited by *A.* Subsequently, *S.* the widow of *N.* adopted the plaintiff, her daughter's son, who sued, as adopted son, for possession of the property in the hands of *A.*

Held, that the adoption, though valid for spiritual purposes, could not have the effect of divesting the property vested at the date of the adoption in *A*, the heir of the last male holder. (*Wadia and Wassoodew, JJ.*) ANANDIBAI *v.* VASUDEV. **180 I C. 411=11 R.B. 297=40 Bom. L R. 1231=A I R. 1939 Bom. 81.**

——*Adoption—Widow—Powers of—Limits to —Death of last surviving coparcener unmarried —Succession by mother—Adoption by latter—Subsequent adoption by widow of predeceased coparcener—Validity—If revives co-parcenary or divests estate already vested.*

It is settled law that where a widow who has succeeded as heir to person makes an adoption, the estate she has inherited from her son is divested and the adopted son becomes the owner. That is to say, the adopted son becomes the natural born son. Where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. *V*, and his sons *Y.* and *M.* constituted a joint Hindu family. After *V's* death *Y* and *M*, continued as members of the joint family. *Y* died leaving his widow. Then *M* died leaving his widow and a son. The latter, a minor, died unmarried, and was succeeded by his mother as heir. This widow (widow of *M.*) adopted the defendant to her husband. After this, *Y's* widow adopted the plaintiff to her husband. The plaintiff filed a suit against the defendant for partition claiming a half-share and the family properties in the possession of the defendant.

Held, that though the adoption of the plaintiff was valid, it had not the effect of reviving the coparcenary which came to end on the death of the minor son of *M*, or divesting either *M's* widow or her adopted son, the defendant. (*Broomfield and Sen, JJ*) RUDRAPPA YELLAPPA *v.* MALLAPPA. **187 I.C. 360=12 R.B. 425=41 Bom.L.R 1277=A.I R 1940 Bom. 95.**

——*Adoption—Widow—Powers of—Limits to —Successive adoptions—Validity—Adopted son leaving only female issue—If bar to further adoption by adoptive mother.*

R died in 1900, leaving behind him no issue, His widow adopted in 1904, *C*, who did not survive long after, and died in 1905 before marriage. *C's* successor and collateral *G* gave his son *S* in adoption to the widow in 1906. *S.* remained in possession till 1921. When he died leaving only two daughters, but no son, his wife had predeceased him. After a few months the widow *R* adopted for the third time a son to her husband from a stranger family; *G's* son challenged the adoption as being invalid.

Held, that the existence of daughters left by the prior adopted son was no obstacle to the widow's right to adoption for another time, as the daughters could not continue the line of her father and that the power of the widow to adopt not having been extinguished or exhausted, the adoption was valid under the law. (*Broomfield and Wassoodew, JJ.*) CHANBASAPPA RACHAPPA *v* MADIWALAPPA GURSHIDAPPA. **I L R. (1937) Bom 642=170 I.C 999=10 R B. 180=39 Bom. L.R. 591=A.I.R. 1937 Bom. 337.**

——*Adoption—Widow—Powers of—Limits to —Divesting of an estate—Death of a son leaving a widow—Mother's right to adopt—Nattukottai Chetties—Custom.*

Among the Nattukottai Chetties of Madras there is a custom which permits a monther-in-law to make an adoption notwithstanding the existence of a daughter-in-law in whom the estate has already vested on the death of the son. But the son so adopted will not, regardless of other considerations, divest the daughter-in-law of the estate of her husband already vested in her, although he will be entitled to claim property as adopted son as against other persons. (*Varadachariar and Burn, JJ.*) SUBRAMANIAM CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **59 Mad. 1064=164 I.C. 977=9 R.M. 189=1936 M.W.N. 774=44 L.W. 185=A.I.R. 1936 Mad. 642=(1937) 1 M.L.J. 60.**

——*Adoption—Widow—Powers of—Partition in joint family—Subsequent adoption by widow of predceased coparcener—Validity—If gives adopted son right to claim share in property partitioned before.*

In principle there is no distinction between the extinction of a copaparcenary by the death of the last surviving coparcener and its extinction by partition, so far as the rights of an adopted son, adopted after the extinction of the co-parcenary, are concerned. *S* and *I* were two brothers constituting a joint Hindu family. *S* died in 1925, leaving a widow *P* on 18—9—1933. *I* and his son *G.* who were the only coparceners divided the properties between themselves by means of a partition deed, which provided, *inter alia*, that the maintenance due to *P*, under a decree obtained by her against the family, should be paid by *G* alone. On 10—11—1933, *P* adopted the plaintiff to her husband on 24—1—1935 the plaintiff filed a suit to recover a half-share in the family property from *I* and *G*, as the adopted son of deceased *S*.

Held, that although *P* was entitled to adopt, and the plaintiff's adoption was therefore valid, the plaintiff would by the adoption acquire no right to share in the joint family property which had already been partitioned before her adoption. The mere fact that by the partition deed, *G* undertook the liability to pay the maintenance which had been awarded to *P*, the widow of *S*, by the Civil Court, did not create any state of jointness between *G* and *P*, and the subsequent adoption of the plaintiff by *P* could not have the effect of reviving the coparcenary between *I* and *G*, which had been terminated by the partition, nor would it give the adopted son any right to divest either of them of the property which they had taken at the partition. (*Wadia and Wassoodew, JJ.*) IRAPPA LOKAPPA *v* RACHAYYA MADIWALLAYYA. **I.L.R. (1940) Bom. 42=187 I.C. 504=12 R.B. 465=41 Bom.L.R. 1300=A.I.R. 1940 Bom. 118.**

———*Adoption—Widow—Powers of—Prohibition by husband implied from disposition of property and direction as to performance of funeral rites in will—Effect of—Consent of sapindas—Value of.*

If there is a prohibition by her husband against adoption, an adoption by her even with the consent of the sapindas is invalid. The prohibition need not be express, but may be implied. Further the prohibition may be for all time or during a limited period. If, from the disposition of his property made by the husband under a will and the method indicated therein, the inference is fairly deducible that the testator prohibited the adoption and that it was not in is contemplation to permit an adoption which might in any way conflict with his disposition expressed in the will and that the dispositions could not be given effect unless the adoption was prohibited, a prohibition has to be implied. A testator died leaving him surviving his widow *L*, and two daughters by a predeceased wife, *K* and *J*. *K* had a son *V* and a daughter *Y*. *J* had a daughte *N* and a son *G*. He left a will which, after reciting that he was 70 years old and had no male issue made a complete disposition of his property and effected a division into shares. He gave one set of properties to his wife *L*, the second set to his daughter *K* and her son *V*, and the third set to his daughter *J*. The legatees were given absolute rights in the properties bequeathed to them. In regard to the property given to his widow *L*, it was provided that in case she should die without making a disposition, anything which remained over and above what she had alienated should be enjoyed by each of the daughters and their descendants in equal shares. His widow was to enjoy his residential house for her life and thereafter his daughters and their descendants were to enjoy it in equal shares absolutely. In the last portion of the will the testator enjoined that for the expenses of his funeral obsequies, *L* should contribute Rs. 250 and *V*, Rs. 250 and that *V* alone shall perform krityam and other ceremonies.

Held, that the widow had no power to make an adoption to her husband and that if an adoption were adopted it would frustrate the expressed wishes of the testator both as regards the disposition of the properties and as to the performance of his funeral rites (including therein not only the immediate ceremonies but also the monthly and annual ceremonies which ought to be customarily performed to a deceased).

Held, further, that even if it be held that there was no total prohibition of an adoption for ever, the widow was clearly under a disability to adopt so long as *V* was alive and capable of performing the ceremonies which would confer religious benefit on the testator. (*Venkataramana Rao, J.*) PANCHAPAGESA IYER *v.* GOPALAN. **183 I C. 877=12 R.M. 382=1938 M.W.N. 1180=48 L.W. 887=A.I.R. 1939 Mad. 216.**

———*Adoption — Widow — Power of—Widow succeeding after death of mother-in-law—Bombay school.*

When a widow adopts a son to her husband (who predeceased his undivided brother) after the inheritance devolved on her from the mother-in-law who had succeeded as mother to the adopting widow's husband's surviving brother, the adoption is valid so as to vest the property in the adopted son. (*Niyogi, Subhedar and Pollock, A.J.Cs.*) RAMACHANDRA *v.* MT. YAMUNI BAI. **31 N.L.R. (Supp.) 180=162 I.C. 571=8 R.N. 273=A.I.R. 1936 Nag. 65 (F.B.).**

———*Adoption — Widow — Power of—Widow taking maintenance in cash and surrendering properties allotted therefor to sole surviving coparcener—If loses right of adoption.*

Where one of two brothers constituting a joint Hindu family dies, his widow is on his death competent to adopt to her husband. The mere fact that the widow claims maintenance in cash from the surviving coparcener and surrenders the properties allotted for that purpose cannot be a ground for holding that the widow impliedly agrees to give up her rights of adoption or that the adopted son's rights should be restricted in relation to his claim to the family property. When the widow's power of adoption has not been lost in any way known to the Hindu Law, the adoption is valid and the adopted son would be entitled to a share in the joint ancestral property in the hands of the surviving coparcaner. (*Wassoodew and Indarnarayan, JJ.*) AIYANGOUDA BASANGOUDA *v.* GADIGEPPAGOUDA. **188 I.C. 873=13 R.B. 31=42 Bom.L.R. 256=A.I.R. 1940 Bom. 200**

———*Adoption—Widow—Power to adopt—Extent and limit.*

The vesting of the property on the death of the last holder in some one other than the adopting widow, be it another coparcener of the joint family or an outsider claiming by reverter or by inheritance cannot be in itself the test of the continuance or extinction of the power of adoption. (*Stone, C.J. and Niyogi, J.*) MST. DRAUPADI *v.* VIKRAM. **I L R 1938 Nag. 88=179 I C. 82=11 R.N. 264=1938 N.L.J. 237=A.I.R. 1938 Nag. 423.**

———*Adoption—Widow—Powers of under Mitakshara in Mysore State—Disruption of joint family subsequent to death of husband - Subsequent adoption—Validity—Right of adopted son to share in property formerly held by joint family.*

There is no text, no authority and no reason why a properly authorised widow governed by the Mitakshara School of Hindu Law should not adopt a son, even if the adopted son gets no property. That the widow's husband has died as a coparcener in his joint family and his coparceners have become divided after his death or the coparcenary has otherwise come to an end does not affect her right to make a valid adoption in any way. The validity of a widow's adoption is not affected by the question whom it might divest of property. But an adoption so far as it affects property, does not by any fiction relate back to any point of time before its own date, though for the continuance of the family line and the religious and secular consequences of that continuance an adoption must relate back to the death of the adoptive father. If the adoptive father's family is still undivided at the date of the adoption, the adopted son becomes a member of that joint family and at once becomes a coparcener in respect of the family property as it stands at that moment. It is to his father's estate as it stands at the date of the adoption that he succeeds. If the joint family of which the adoptive father

was a member has ceased to exist before the adoption takes place by reason of a partition, there is no coparcenary into which the adopted son can enter, and the adopted son can therefore get no right to share in the property which once belonged to the joint family which has come to an end before his adoption was made. (*Reilly, C.J. and Abdul Ghani, J.*) SANKARAMMA *v.* KRISHNA RAO. **16 Mys.L.J. 376=43 Mys.H.C. R. 415.**

———*Adoption—Widow—Powers of adoption in Mysore—Death of last male owner—Subsequent adoption by widow of predeceased coparcener—Validity—Estate already vested in collateral heir—If divested.*

Under the Hindu Law prevailing in the Mysore State, an adoption by the widow of a deceased coparcener of a son to her deceased husband subsequent to the death of last surviving coparcener of the joint family is valid; but such adoption cannot have the effect of divesting property which has already vested in collateral heir after the death of the last male owner by inheritance after the extinction of the coparcenary. (*Abdul Ghani and Nagesvara Iyer, JJ.*) DASAPPA *v.* SESHAGIRI RAO. **43 Mys.H.C.R. 438=16 Mys.L.J. 301.**

———*Adoption—Widow—Power to adopt—Last surviving coparcener's widow consenting to adoption by a predeceased coparcener's widow—Effect on the former's right to adopt.*

Where the widow of the last surviving coparcener consents to an adoption by the widow of a predeceased coparcener, that does not take away or destroy her inherent right to adopt, which she may exercise either during the lifetime of the other adopted boy or after his death. (*Stone, C.J. and Niyogi, J.*) MST. DRAUPADI *v.* VIKRAM. **I.L.R. (1938) Nag. 88=179 I.C 82= 11 R.N. 264=1938 N.L.J. 237=A.I.R. 1938 Nag. 423.**

———*Adoption —Widow —Power to adopt—Hindu dying leaving surviving him his widow and his son's widow—Adoption by son's widow during lifetime of father's widow—Validity.*

Where a Hindu dies leaving behind him his own widow and the widow of his predeceased son an adoption by the widow of the son during the lifetime of the father's widow is not valid. The son, whose widow makes the adoption, having died during the lifetime of his father, the estate vests in the widow of the father and she cannot be divested or the estate by any act of the son's widow who at the time of the adoption holds no position in the family and is merely entitled to a pittance (*Addison and Din Mahomed, JJ.*) PIARE LAL *v.* HEM CHAND. **40 P.L.R. 824=178 I.C. 515=11 R.L. 467=A.I.R. 1938 Lah. 539.**

———*Adoption—Widow in Bombay—Powers of —Widow inheriting to last male-holder as* gotraja sapinda*—Adoption by —Validity —If affects devolution of property on reversioners after her death.*

Under the Hindu Law of adoption prevailing in the Bombay Presidency, the power of a widow to adopt depends on considerations of a religious character, and any widow of a Hindu can adopt to her husband so long as she is the person entitled to carry on the line. But an adoption by a widow where the coparcenary is at an end, does not operate to divest property vested in or through the heir of the last holder. A widow in Bombay who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male-holder cannot by adoption alter the devolution of the property to which she is entitled as such widow after her own death. *K* died leaving a widow *B*, a son named *D*, and the 1st defendant who was the widow of a deceased son. *D* died leaving a widow *L* and an infant son who died shortly afterwards, and thereupon the property passed to the latter's mother *L*. *L* died a year later, and the property passed to *D's* mother *B*. *B* died some years later, and the property then passed to the 1st defendant who later on adopted defendant No. 2. Plaintiff, a reversioner, claiming through a collateral branch of the family sued for declaration that the adoption was illegal and void and not binding on him.

Held, that the adoption was valid, but that it had no effect on the devolution of property as against the plaintiff. (*Beaumont, C.J., Broomfield and Wassoodew, JJ.*) RADHABAI DAMODAR *v.* RAJARAM TRIMBAK. **I.L.R. (1938) Bom. 679=177 I.C. 165=11 R.B. 68=40 Bom. L.R. 559=A.I.R. 1938 Bom. 383 (F.B.).**

———*Adoption—Widow —Subsequent alienation —Validity—Agreement between adopting widow and natural father of adoptee—Agreement permitting widow to deal with estate at her will without regard to adopted son's rights and interest—Validity.*

An arrangement between the adoptive widow and the natural father of the adopted boy which permits the widow in practice to deal with the estate at her own sweet will without any reference to the rights and interests of the adopted son is not binding on the adopted son. At the time of adoption of a son an agreement was entered into between the adopting widow and the natural father of the adopted boy which was to the effect, that the widow should make management of and enjoy all her husband's property during her lifetime and after her death the adopted son should take possession thereof and manage. The widow made several alienations thereafter of practically the whole of the estate. The adopted son sued to set aside the alienations and for possession of the properties. It was pleaded that the alienations were valid for the widow's lifetime in view of the agreement between the widow and the natural father and therefore the suit was premature.

Held, that the agreement practically deprived the plaintiff of the benefit of his estate during the widow's lifetime and was therefore invalid and not binding on him, and the alienations being invalid could be set aside even during her lifetime. (*Broomfield and Sen, JJ.*) SHANKARDAS *v.* CHANNAPPA. **40 Bom L.R. 443=176 I.C. 974=11 R.B. 59=A.I.R. 1938 Bom. 336.**

———*Adoption—Widow – Simultaneous adoption of two sons—Validity.*

A simultaneous adoptions by a widow of two sons to her husband is invalid. The Hindu Law does not encourage plurality of adoption. (*Wassoodew and Sen, JJ.*) BASAWANTAPPA MALLAPA *v.* MALLAPPA. **I.L.R. (1939) Bom. 245=182 I.C. 302=12 R.B. 7=41 Bom.L.R. 268=A.I.R. 1939 Bom. 178.**

HINDU LAW—Adoption.

———*Adoption—Widow in Bombay—Powers of —Widow inheriting to* gotraja sapinda *of husband—Adoption of son to husband—Validity—Property—If vests immediately on adopted son.*

The widow of a *gotraja sapinda* in Bombay who succeeds as heir to an agnate of her husband stands in the same place as her husband, if living, would occupy. She can make a valid adoption to her husband, and the property inherited by her would, on such adoption, immediately vest in the adopted son, who would thereupon be entitled to recover the same from an alienee who holds it under an invalid alienation by the widow of the last male-holder. (*Divatia, J.*) SHIVAPPA *v.* KARIYAPPA. 180 I C 966=11 R B. 322=41 Bom. L.R. 208=A.I R. 1939 Bom. 123.

———*Adoption—Widow of deceased coparcener —Adoption by during continuance of coparcenary represented by sole surviving coparcener—Validity—Right of adopted son to share in joint property.*

So long as there is a single coparcener left, the coparcenary cannot be considered to be extinct. Where the coparcenary exists at the date of the adoption by a widow of a deceased coparcener, the adoption is valid, and the adopted son becomes a member of the coparcenary and takes his share in the joint property accordingly. (*Wadia and Norman, JJ.*) SANVEERANGOUDA *v.* BASANGOUDA. 184 I.C 337=12 R B. 161=41 Bom.L.R. 561=A.I R. 1939 Bom. 313.

———*Adoption—Widow's right to adopt—Nature of right—Divesting of estate.*

Where the adoption takes place after the termination of the co-parcenary by the death of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving coparcenary and does not divest the property from the heir of the last surviving coparcener other than the widow or those claiming through him or her. This view however would not affect the validity of the adoption itself, as the power to adopt depends on considerations of a religious character. (*Nawal Kishore, C J. and Sukhdeonarain, J.*) BHERONDON *v.* KHETDAN. 1939 M.L.R. 95 (Civ.).

———Alienation.

See also HINDU LAW—
(1) DEBTS.
(2) GUARDIANSHIP—ALIENATION.
(3) RELIGIOUS ENDOWMENT — ALIENATION.
(4) WIDOW—ALIENATION.
AFTER-BORN SON.
ANTECEDENT DEBT.
BENEFIT TO THE FAMILY.
CO-PARCENER'S MORTGAGE FOR PRIVATE DEBTS.
FATHER.
GUARDIAN.
ILLEGAL TRANSFER BY ADULT MEMBERS.
JOINT FAMILY.
JUNIOR MEMBERS.
MANAGER.
VALIDITY.
WIDOW.
AUTHORITY.
IMPRUDENT TRANSACTION.
NECESSITY.
POWERS.
SETTING ASIDE.
VALIDITY.

HINDU LAW—Alienation.

———*Alienation—After born son—Right of to challenge.*

A living child should be presumed to have been conceived at least 210 days before birth, and therefore a child born within 210 days of an alienation must be presumed to be *en ventre sa mere*. Where, therefore, a son is born within 209 days of the alienation by his father of the family property made without necessity, and no evidence is given by the alienee to show that he is born later, the son can challenge the alienation by the father and the alienation made without necessity is not binding on the son. (*Venkataramana Rao, J.*) RAMA RAO *v.* VENKATA SUBBAYYA. 173 I.C. 347=10 R.M. 566=46 L.W. 309 =A.I.R. 1937 Mad. 274.

———*Alienation — After-born son — Right to challenge.*

In the case of a mortgage executed by the father who was the sole owner of the estate at that time, the mortgage could not be challenged by a son or sons born subsequently. (*Bennet and Varma, JJ.*) DAULATA KUER *v.* RAM DAS RAI. 189 I.C. 712=13 R.A. 117=1940 A.W R. (H.C) 276=1940 A.L.J. 366=A.I.R. 1940 All. 349.

———*Alienation— After-born son — Right to challenge — Alienation not binding on son already in existence on date of alienation—Effect.*

A son born after an alienation of joint family property by a Hindu father cannot question the alienation even though there were other members of the joint family at the date of the alienation who had not consented to and validated the alienation and who were not bound by the said alienation. (*Venkataramana Rao and Abdur Rahman, JJ.*) VASIREDDI BALACHANDRASEKHARA VARAPRASAD *v.* LAKSHMINARASIMHAM. I.L R. (1940) Mad. 913=51 L.W. 622=1940 M.W.N. 927=A.I.R. 1940 Mad. 691=(1940) 1 M L.J. 820.

———*Alienation — After-born son — Right to challenge alienation already effected before his birth.*

An after-born son under the Hindu Law can only acquire an interest in the property which exists on the date of his birth excluding that which has already been alienated. In the case of property already mortgaged by the father, the after-born son can only succeed to the equity of redemption and cannot challenge the alienation to the extent to which it has already been made. (*Harries, C J. and Lall, J.*) APURBA KRISHNA *v.* SUBHANAND CHAUDHURY. 5 B.R 635=181 I.C. 638=11 R.P. 617=20 Pat.L T. 427=1939 P.W. N. 251=A.I.R. 1939 Pat. 552.

———*Alienation—After-born son—Right to set aside.*

An alienation made by a Hindu father can be challenged as not being for legal necessity or for antecedent debt only by his sons existing on the date of the alienation. Sons not existing then, but born subsequently cannot question the alienation effected before they come into existence. (*Broomfield and Sen, JJ.*) SHANTAYA KOTRAYA *v.* MALLAPPA BASAPPA. 179 I.C. 33=11 R.B. 216 =40 Bom.L.R. 1029=A.I.R. 1 38 Bom. 500.

———*Alienation—After-born son—Right to set aside.*

HINDU LAW—Alienation.

Where the only other coparcener in existence besides the father at the time of an alienation of family property by the father is a minor, that son alone is entitled to sue to avoid the alienation of his share of the family property. His right is personal, though a suit by him, if successful, enures for the benefit of all future members. His right to sue on behalf of the family cannot be exercised after his death by a brother born after the alienation though before his death, because the right to challenge the alienation is confined to coparceners alive on the date of the alienation. (*Newsam, J.*) PAPPU REDDI *v.* APPAJI NAYAKKAR **1937 M.W N. 1261=174 I.C. 838=10 R.M. 744= A.I.R. 1938 Mad. 224.**

———*Alienation—Antecedent debt—Alienee himself antecedent creditor—Necessity for antecedent debt—Burden of proof.*

Where an alienation is made for an antecedent debt due to the alienee himself, the burden of proof is not on the alienee affirmatively to prove the necessity for the antecedent debt. An alienee is entitled to rely upon a debt which is due to him and which is not immoral, illegal or opposed to public policy and has not been contracted as an act of reckless extravagance or wanton waste or with the intention of destroying the interests of reversioners. It would be for the reversioner to establish these circumstances in order to prove want of necessity or to shift the burden on the alienee. (*Jai Lal, J.*) PUNNAN SINGH *v.* MEHNGA SINGH. **8 R.L. 1027= 163 I.C. 153=38 P.L.R. 714.**

———*Alienation—Antecedent debt—Meaning of —Mortgage for money borrowed for taking* zarpeshgi *— Mortgage contemplated at time of taking* zarpeshgi *but executed later—If antecedent.*

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. The two transactions may be entirely dissociated from one another and where that is so, the liability incurred at the former date will be an antecedent debt on the date of entering into the second document, but the question whether this is so or not is primarily a question of fact. Where therefore a mortgage of the joint family property is contemplated at the very time of taking a *zarpeshgi*, but is executed some weeks later, it is not an independent transaction. (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **17 Pat 168=173 I.C. 292=4 B.R. 256 =10 R.P. 398=A.I.R. 1938 Pat. 44.**

———*Alienation—Benefit to family—Mortgage of joint family property for purchasing another property—If justified.*

Per *Wort, J. Rowland, J., dissenting.*—It is impossible to give a definition of what is a benefit to the estate but, the jeopardising a joint Hindu family property for the purpose of purchasing another property can never under any circumstance be considered a benefit to the estate (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **17 Pat 168=173 I.C. 292=4 B.R. 256=10 R.P. 398=A.I.R. 1938 Pat. 44.**

———Alienation—Bombay school—Alienation by coparcener prior to adoption not for necessity and in excess of share—Right of adopted son to challenge. *See* ADOPTION—BOMBAY SCHOOL. **I.L. R. 1939 Bom. 245=A.I.R. 1939 Bom. 178.**

———*Alienation — Coparcener — Mortgage of joint family property to secure private debts— Mortgagee taking mortgage with knowledge of private character of debt and of property being joint family property — Subsequent partition— Allotment of mortgaged property to member not mortgagor—Remedy of mortgagee—Substituted security.*

Where a creditor lends money to a Hindu coparcener for his private purposes and takes a mortgage from him of joint family property by way of security for such private debts of the mortgagor, he takes the same subject to the right of the other members of the family to enforce a partition and subject to any decree that may be passed in such a partition suit. When subsequently there is a partition effected in which the mortgaged property is allotted to another member not the mortgagor, free from all encumbrances, the creditor has no right to challenge such allotment or alienation in the absence of proof that the allotment is unfair. The mortgagee creditor must seek his security in the properties allotted to his mortgagor in the partition in substitution of his undivided share which alone he could mortgage before such partition. (*Leach, C.J. and Varadachariar, J.*) MANICKAVELU CHETTY *v.* SATEEDAN SOWCAR. **1937 M.W.N. 1340.**

———*Alienation — Coparcener — Purchaser of share from—Rights of—Suit for partition— Limitation for—Limitation Act, Arts.* 120, 142 *and* 144*—Applicability.*

It is clearly established that a purchase from a member of a Hindu joint family does not acquire a right to be considered himself a member of the joint family in place of the vendor or a right to have joint possession of the family property in place of the vendor, nor, of course, does he acquire any right to possession of any specific part of the property, that being a right which the vendor himself did not possess. The only right which the purchaser has in such a case is a right to sue for partition and procure to be allotted to himself the share which would have gone to his vendor. From this it follows that the purchaser cannot rely on the ordinary rule that the possession of one co-tenant is the possession of all and the possession of the other co-owners cannot help him; secondly, the possession of the other parties cannot be adverse to the purchaser, because adverse possession denotes the exclusion of somebody entitled to possession, and since the purchaser is not entitled to possession, he cannot be excluded. To a suit for partition by the purchaser neither Art. 142 nor Art. 144 would apply, as there is no case of adverse possession. The residuary Art. 120, must therefore apply, and the suit must be brought within six years of the sale or the death of the vendor. (*Beaumont, C J. and Wadia, J.*) BAI SHEVANTBAI *v.* JANARDAN WARICK **184 I C 23=12 R.B. 135=41 Bom.L.R. 631=A.I.R. 1939 Bom. 322.**

———*Alienation—Co-parcener—Right of alienee*

In the case of an alienation by a co-parcener, the alienee, whether a vendee or a mortgagee, is entitled to enforce his claim against the alienor's right, title and interest in the property as it stood at the time of the alienation. (*Grille, J.C. and*

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Pollock, A. J. C.) JINWARSA GANGASA *v* GUNWANT RAO. 31 N.L.R. (Supp.) 124=160 I.C. 196=8 R.N. 157=A.I.R. 1936 Nag. 34.

———*Alienation — Daughter inheriting father's property— Powers of alienation—Improvements to property—If justifies alienation.*

A limited owner, such as a daughter inheriting her father's property, may alienate the property not only for necessity but also for the benefit of the family. She can alienate for a protective purpose, *i.e.*, for preservation of the estate or for protecting it from danger. She is not justified in borrowing money for effecting costly improvements to the property out of all proportion to the value of the property, and effecting alienations without any reasonable hope of paying off those debts. (*Nageswara Iyer and Singaravelu Mudaliar, JJ.*) SOORAPPA *v.* SUBBIAH. 44 Mys.H.C.R. 332=18 Mys.L.J. 69.

———*Alienation — Duty of lender — Necessity proved—Proof of application of money, if necessary.*

When once an alienation has been proved to be for legal necessity, the creditor is not bound to prove further the actual application of the money borrowed. (*Zia-ul-Hasan and Hamilton, JJ.*) LALTA *v.* AVADH NARESH SINGH. 15 Luck. 68=184 I.C. 443=12 R.O. 121=1939 O.W.N. 920=1939 O.L.R. 626=1939 A.W.R. (C.C.) 222=A.I.R. 1940 Oudh 59.

———*Alienation—Father—Alienation by, without necessity and without consent of son—If void or voidable.*

An alienation by a Hindu father of property belonging to the joint family consisting of himself and his sons without the latter's consent and without necessity is a transaction which can be perfected by the subsequent consent of the son, and it can be repudiated and set aside by the subsequent action of the son. Such repudiation goes back to the date of the original alienation. Such an alienation cannot be regarded as wholly null and void, but must be regarded as perfect unless and until set aside, and one that accordingly becomes unchallengable when the power to sue to set it aside is lost. (*Madhavan Nair and Stone, JJ.*) VISWESWARA RAO *v.* SURYA RAO. 59 Mad. 667=163 I.C. 712=9 R.M. 46=43 L.W. 349=1936 M.W.N. 163=A.I.R. 1936 Mad. 440=70 M.L.J. 360.

———*Alienation—Father—Alienation not supported by necessity—If void or voidable.*

An alienation of ancestral property by a Hindu father without legal necessity or justifying cause is not void *ab initio*, but voidable, and can only be avoided by his son who can also satisfy the alienation. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA. 40 Bom.L.R. 539=177 I.C. 290=11 R.B. 74=A.I.R. 1938 Bom. 388.

———*Alienation—Father—Charge to secure payment of rent due under lease—Validity—Lease not executed for necessity or benefit.*

The father of a joint Hindu family cannot lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself without the existence of legal necessity or benefit to the estate, where the liability under the lease is not antecedent in fact or in point of time to the execution of the security bond. (*Sulaiman, C. J., Bennet and Bajpai, JJ.*) BHARATPUR STATE *v.* SRI KRISHAN DAS. 58 All. 804=162 I.C 642=8 R.A. 883=1936 R.D. 154=1936 A.W.R. 329=1936 A.L.J. 236=1936 All.L.R. 455=A.I.R. 1936 All. 327 (F.B.).

———*Alienation—Father — Gift of property to* avarudh stree*—Validity.*

A gift of a portion of the joint family property by the father during his lifetime to an *avarudh stree* kept by him, is invalid and is not binding on his son. Under Hindu Law an *avarudh stree* gets no right of maintenance against her paramour during his lifetime. It is only on his death that his estate in the hands of those who take it, becomes liable for her maintenance if she was in his exclusive keeping until his death. Whatever moral obligation there may be on a Hindu to provide for her in his lifetime it cannot, by any stretch of imagination be said that there is any legal necessity for making such provision and without legal necessity no father in a joint Hindu family can transfer the family property. (*Nanavutty and Zia-ul-Hasan, JJ.*) RAB PRASAD SINGH *v.* CHHOTEY MUNWAN. 12 Luck. 469=1936 O.W.N. 899=9 R.O. 144=164 I.C. 1000=1936 O.L.R. 563=A.I.R. 1937 Oudh 29.

———*Alienation—Father—Gift to daughter and daughter's daughter—Validity—Right of son's creditors to impeach as fraudulent transfer—T. P. Act, S.* 53.

It is competent to a Hindu father to make a gift of a reasonable portion of the ancestral immovable property to his daughters without reference to his son; such a gift cannot be said to have been made on behalf of the son. It is a power vested in the father under the Hindu Law, which he can exercise subject to certain restrictions and limitations. The fact that the son is indebted to a creditor does not detract from the validity of the gift which is otherwise reasonable and valid, as that does not take away the power of the father to make such a gift; nor can it be said that the gift is not *bona fide* on that account. The son's creditor cannot therefore question such a gift by the father as being a transfer, in fraud of creditors under S. 53, T. P. Act, as that section cannot apply when there is no transfer by the son who is indebted but by the father and manager, especially when the creditor has attached the son's interest long after such a gift by the father. But a Hindu father has no power to make a gift of immovable property of the family to his daughter's daughter, and such a gift is not binding on the son or his share in the family property. (*Venkataramana Rao, J.*) SITHAMAHALAKSHMAMMA *v.* KOTAYYA. 164 I.C. 1109=9 R.M. 199 (2)=1936 M.W.N. 980=44 L.W. 289=A.I.R. 1936 Mad. 825=71 M.L.J. 259.

———*Alienation—Father—Immorality When can absolve family from liability—Advances to head of family business—Duty of lender.*

Mere proof of immorality of the father of a joint Hindu family will not absolve the family from liability. It must be further shown that there is some connection between the debt and immorality. The duty of a lender to enquire is the same in all cases and applies also to cases of loans to head of a family having trade as its

business. While a lender has not got to see to the application of the money, he is put on enquiry and he must satisfy himself that the loan is necessary. The fact that the lender is dead and, therefore, cannot state what enquiries he made does not relieve his heirs from the necessity of showing that there were proper inquiries. (*Leach, C.J. and Madhavan Nair, J.*) NANNU SHANKAR TAWKER *v.* BASHYAM IYENGAR. **1938 M.W.N. 126=47 L.W. 397=(1938) 2 M.L.J. 256.**

——— Alienation—Father—Mortgage by—Decree against sons—Binding nature on latter's sons—Suit by grandsons of mortgagor to set aside mortgage—Maintainability—*Res judicata. See* C. P. CODE, S. 11. **70 M.L.J 627.**

———*Alienation—Father—Mortgage by—Decree for sale on—Sale in execution—Suit by sons impeaching—Burden of proof—Illegality or immorality of mortgage debt—Duty of sons to establish.*

Where joint family property has been sold in execution of a decree for sale on a mortgage executed by the father and passed out of the possession of the joint family the sons of the mortgagor cannot succeed in a suit to declare the decree and sale not binding on them or obtain possession of the property unless they prove that the mortgage debt was incurred by their father for purposes illegal or immoral. The fact that the sons, who were minors at the time of the mortgage suit, were impleaded as parties defendants to that suit represented by their father as guardian *ad litem* cannot make any difference as regards the application of this principle of law. (*Niamatullah, Ag C.J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH. **1937 A.L.J. 1252= 1937 A.W.R. 1183.**

———Alienation—Father—Mortgage by—Decree on—Suit by after-born son to set aside mortgage and decree—Limitation—Starting point—Cause of action. *See* LIMITATION ACT, ART. 120. **43 L. W. 349=1936 M.W.N. 163=70 M.L.J. 360.**

———*Alienation—Father—Mortgage by—Money borrowed for litigation to establish adoption of only minor son—Validity.*

A mortgage executed by a Hindu father for money borrowed for the purpose of carrying on a litigation to establish the adoption of his only minor son is one for legal necessity or in any case for the benefit of the family as a whole and in particular for the benefit of the minor son. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA. **40 Bom.L.R. 539=177 I.C. 290= 11 R.B. 74=A.I.R. 1938 Bom. 388.**

———*Alienation—Father—Mortgage by—Necessity or benefit—Proof—Duty of alienee to inquire.*

To justify an alienation of family property by the father or manager of a joint Hindu family, there must be a need, or the transaction must be entered into for the benefit of the estate. Even if in fact there was no need or in fact there was no benefit to the estate, if the creditor who is bound to inquire into the necessity for the loan and to satisfy himself as a reasonable person that the manager in the particular instance is acting for the benefit of the estate or the family, makes such an inquiry and acts honestly the real existence of an alleged sufficient or reasonably credited necessity is not a condition precedent to

the validity of the alienation by way of mortgage. Nor is the creditor bound to see to the application of the money What is a legal necessity or what is for the benefit of the family cannot admit of one single and uniform answer. It must depend on the circumstances of each case. A transaction entered into for the sake of family is binding on those who are benefited by it. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA MALLAPPA **40 Bom L R. 539=177 I.C. 290=11 R.B. 74=A.I.R. 1938 Bom 388.**

———*Alienation—Father—Mortgage by—Not for antecedent debt—Enforceability against son as debt.*

Where a father executes a mortgage of the joint family property but such mortgage is not for the payment of an antecedent debt, the mortgage though not enforceable against the son as a contract of transfer can be enforced against him as a contract of debt by his father and the son is liable to pay his father's debt under the mortgage as his personal debt apart from the mortgage security. (*Niyogi, J.*) CHUNNILAL DHURAJMAL *v.* CHAKKILAL. **172 I.C. 493=10 R.N. 217=A.I.R. 1937 Nag. 327.**

———*Alienation—Father—Mortgage by for himself and as guardian of minor son—Property described as self-acquisition but really joint family property—Mortgagor not manager of family but having father and uncle—Suit by mortgagee impleading mortgagor and son—Decree against minor son's share—Right of mortgagee—Nature and extent of son's liability.*

1st defendant executed a mortgage bond for Rs. 11,000 borrowed by him for himself and as guardian of his minor son, the 2nd defendant, describing the mortgaged properties as properties which he purchased as his self-acquisitions. The properties were not, however, his self-acquisitions but joint family properties belonging to a joint family which consisted besides himself and his minor son, his father and uncle. The mortgagee brought a suit on the mortgage impleading the mortgagor and his son as the defendants to the suit, but he did not implead the 1st defendant's father and his uncle.

Held, (1) that though it might be open to the mortgagee to implead as parties to the suit persons who were not parties to the mortgage and seek to bind them by the mortgage, the omission to so implead them would not disentitle him to a decree even as against persons impleaded on the footing that the properties were joint family properties; the only result of the omission would be that the question would be left open as against the non-impleaded parties; (2) that the fact that the plaint was framed on the footing that the mortgaged properties were the self-acquired properties of the 1st defendant, was no bar to a mortgage decree being passed even as against the 2nd defendant, when the properties were really joint family properties; (3) that the mere description of the properties in the mortgage deed as self-acquisitions of the 1st defendant did not indicate that he did not intend to deal with the properties otherwise than as self-acquisitions or to bind the 2nd defendant's interests in them; (4) that though the 1st defendant was not the manager of the family, his father being alive, that was no reason for holding that he had no power to bind

his minor son's share in the family properties, as the true basis of the son's obligation to pay his father's debts was the relationship of father and son and not the accident of the father being the manager of the joint family. The mortg ge would be binding on the 2nd defendant's share to the extent to which the debts referred to in the mortgage deed were shown to be antecedent debts; for any debts which were not found to be antecedent the mortgagee could get relief against the 2nd defendant as on a money claim, and not on the mortgage as such. (*Varadachariar and Mockett, JJ.*) SHANMUGAM *v.* NACHU AMMAL. 169 I.C. 26=9 R.M. 720=1936 M.W.N. 1263=44 L.W. 738=A.I.R. 1937 Mad. 140=(1937) 1 M.L.J. 278.

———*Alienation—Father—Martgage by—Right of after-born sons to challenge.*

Subsequently born sons can challenge the validity of a mortgage made without legal necessity if there were at the time of the mortgage other coparceners in existence who did not assent to it at the time or subsequently ratify it. (*Grille, J. C. and Pollock, A.J.C.*) JINWARSA GANGASA *v* GUNWANT RAO. 31 N.L.R. (Supp.) 124=160 I.C. 196 =8 R.N. 157=A.I.R. 1936 Nag. 34.

———*Alienation—Father—Mortgage by—Setting aside—Right of son to impeach on ground of immorality, debts discharged by mortgage—Mortgagee making enquiry and acting* bona fide—*If protected.*

Where the sons seek to set aside a mortgage by the father on the ground of immorality of debts which have been discharged by the execution of the mortgage, and it is found that the mortgagee had made reasonable enquiries and acted *bona fide*, the validity of the mortgage would not be affected by the impropriety of the original loan which was paid off with the money borrowed under the mortgage. (*Varadachariar and Pandrang Row, JJ.*) PERIASWAMI *v.* VAIDHILINGAM PILLAI. 176 I.C. 359=11 R.M. 73=47 L.W. 60=1937 M.W.N. 1313=A.I.R. 1937 Mad. 718.

———*Alienation — Father—Mortgage by—Sons when bound—Burden of proof—Duty of alienee—Son's pious obligation to pay father's debt—If arises during father's lifetime—Law in Mysore.*

In Mysore, it has long been recognised that the pious obligation of a Hindu son to pay his father's debts does not arise while the father is alive, it is only after the father's death that his undivided son is bound to pay the father's debts out of the joint family property including the son's share. A Hindu father in Mysore, therefore, during his lifetime has no power to alienate the interest of his undivided son in their joint family property by sale or mortgage in order to satisfy the father's private debts not binding on the joint family. A mortgage executed by a Hindu father cannot be held binding on his son unless it is shown that the amount was borrowed for a family necessity or benefit or unless the mortgagee before advancing the money had made reasonable inquiries which led him to reasonably believe that the amount was required for a family purpose which could be regarded as necessity or benefit of the family. (*Reilly, C.J and Singaravelu Mudaliar, J.*) RUDRAPPA SETTY *v.* RANGOJEE RAO. 45 Mys.H.C.R. 83=18 Mys.L.J. 133.

———*Alienation—Father—Mortgage by—Subsequent partition with son—Mortgagee's right to proceed against properties allotted to son—Doctrine of substituted security—Applicability.*

Properties allotted to a Hindu son in a partition between him and his father are liable to be proceeded against on foot of a mortgage executed by the father alone prior to such partition. The doctrine of substituted securities will not apply in such a case, because the reasons justifying the exoneration of items allotted to another co-sharer, such as a brother, at a fair partition will not apply as between father and son. Where the mortgage by the father is binding on the son, the father and son must be regarded as a single legal entity, and all the properties, allotted to them as a branch at a partition between it and another branch will become subject to the mortgage. The subsequent partition between the father and the son cannot operate to defeat the rights of the mortgagee. The fact that in the partition between the father and the son due provision has been made for the discharge of the mortgage debt from out of the father's share, though it might give rise to claims between the father and the son, cannot affect the rights of the mortgagee to proceed against the properties allotted to the son's share. (*Cornish and Varadachariar, JJ.*) RAMA AIYAR *v.* BAGAVATHIMUTHU PILLAI. 163 I.C. 834=9 R.M. 76=43 L.W. 478 =1936 M.W.N. 374=A.I.R. 1936 Mad. 473=70 M.L.J. 506.

———*Alienation — Father — Mortgage by—Validity—Absence of legal necessity or antecedent debt—Sons—If bound.*

Where the managing member of a Hindu joint undivided estate is the father and the other members are the sons. the estate cannot be bound by a mortgage executed by the father unless the mortgage is executed for purposes of necessity or to discharge an antecedent debt. (*Pollock, J.*) RAMKISAN BHOLARAM *v.* SHFORAM KISAN RAO. 163 I.C. 99=8 R.N. 297=A.I.R. 1936 Nag 93.

———*Alienation—Father—Mortgage by — Validity—Absence of proof of necessity or of antecedent debt—Debt not shown to be immoral—Sons —If bound.*

The law is perfectly clear that an alienation by a Hindu father for an antecedent debt binds the interests of his sons in the property alienated if it is not proved that the debt was immoral. But a mortgage by the father which is not for necessity and not for an antecedent debt does not bind the sons' interests in the property whether or not the debt was contracted for an immoral purpose. It is not necessary in that case to show that the debt was an immoral debt. (*Broomfield and Macklin, JJ.*) ASMAN *v.* GANPAT 40 Bom. L.R. 946=178 I.C. 401=11 R.B. 160=A.I.R. 1938 Bom. 443.

———*Alienation—Father—Mortgage to pay off pre-emption decree—Validity.*

A mortgage executed by a father in order to obtain money to pay off a pre-emption decree, may in certain circumstances be for the benefit of the estate and, therefore, bind the family property and the other members of the family. (*Harries and Bajpai, JJ.*) DHARA SINGH *v.* BHARAT SINGH. 162 I.C. 62=8 R.A. 825=1936 A.L.J. 323=1935 A.W.R. 377=1936 All.L.R. 369=A.I.R. 1936 All. 613.

HINDU LAW—Alienation.

——*Alienation—Father—Mortgage to purchase lands—Mortgagee knowing purpose of mortgage—Mortgage, distinct transaction from sale—Antecedent debt—Mortgage, if binding on the sons of mortgagor.*

A father of a joint Hindu family purchased property *A* and as he had not sufficient money to pay for the whole of the consideration, he mortgaged certain other family property *B* along with the newly purchased property *A*, to raise money for the sale. The vendor had nothing to do with the mortgage and the mortgagee had nothing to do with the sale, except that he knew that the purpose of the money advanced by him, was to pay off the vendor of *A*,

Held, that the mortgage and sale do not amount to one transaction, the mortgage-money was raised to pay off an antecedent debt, and the mortgage is binding on the sons of the mortgagor. (*Horwill, J.*) MARIYAPPA NADAR *v.* RAMANUJA NAICK. **180 I.C 908=11 R.M. 757=1938 M.W.N 60=A.I.R. 1938 Mad. 465.**

——*Alienation — Father—Mortgage to raise loan for starting new* dallali *business—Sons—If bound—Legal necessity—Benefit of the family.*

A mortgage executed by a Hindu father for the purpose of raising money for starting and conducting new *dallali* or commission agency business cannot be held binding on his sons or their interests in the joint family property, since it is of a risky and speculative, and cannot be said to be for legal necessity or benefit of the family where it is proved that the family possesses lands yielding an income more than sufficient for the needs of the family, it cannot be said that the family is under any necessity to borrow any money for its upkeep. In such circumstances loans for financing the new business cannot be for any legal necessity. Nor can the loan be said to be for any benefit to the family. It is not the act of a prudent owner to embark upon a risky business such as a *dallali* business. There can be no question of any need to augment of the family income for maintaining members of the family when the existing income is more than sufficient for the purpose. Any attempt to augment the resources or to provide more luxuries for the family by embarking on a business after contracting a loan has to be treated as one which is not for the benefit of the family. Courts will not encourage a manager or father either to part with the joint family property or to encumber it merely in order to increase the immediate income of the property, because a prudent man will not sacrifice a certain and stable income in favour of the mere prospect of a better income. The loan contracted is neither for necessity nor for the benefit of the family, even though it may not be *Avyavaharika*. Debts which are not *Avyavaharika* are not all beneficial to the family so as to bind it (*Abdul Ghani, O. C.J and Venkata Ranga Iyengar, J.*) THE BANK OF MYSORE, LTD, BANGALORE CITY *v.* VEERAPPA. **45 Mys.H.C.R. 26=18 Mys.L.J. 113.**

——*Alienation—Father—Necessity—Daughter's marriage expenses—How far justifies alienation—Father spending large amount on marriage—Sons, if bound—Extent of liability—Reasonable amount of expenditure for marriage—Limit of.*

HINDU LAW—Alienation.

A Hindu father is entitled to alienate joint family property for the purpose of raising funds for the marriage of his daughters when the income from the family properties is sufficient only for the purpose of the maintenance of the members of the family and is not enough to provide for exceptional expenses such as the expenses of the daughters' marriages. Such expenses would be proper family expenses. But the father is not justified in being extravagant in respect of such expenditure so as to impoverish the family, or in spending a disproportionate amount of the family property on the marriage expenses of a daughter. He is only entitled to raise a reasonable amount of money; if he chooses to raise more, the excess should fall upon his own share of the family property and not upon that of his son. The maximum amount that a father would be entitled to spend on a daughter is what that daughter would get on a partition, as indicated by the Mysore Hindu Women's Rights Regulation (X of 1933). That should be the upward limit of the amount of the joint family funds which could reasonably be spent on the marriage of a daughter. Anything in excess of that amount cannot be binding on the joint family or on the son's share of the family property. (*Reilly, C.J. and Abdul Ghani, J.*) SAMPANGIRAMIAH *v* SUBBA RAO. **15 Mys.L.J. 529=42 Mys.H.C.R. 564.**

——*Alienation — Father—Necessity — Proof—Duty of alienee to make enquiry—Loan to pay off prior mortgage debt—Duty to inquire into necessity for prior mortgage debt.*

A creditor who advances money to a Hindu father or manager on the security of joint family property must make reasonable enquiries about the immediate necessity for the loan, even though he advances the money for the purpose of paying off a previous loan or mortgage. The fact that there is a previous debt or mortgage does not absolve him from making enquiry; he must, if he wants to bind the joint family property, make reasonable inquiries into the validity of and necessity for the pre-existing debt or mortgage and to satisfy himself that the previous mortgage was executed for a justifying necessity binding on the family. (*Reilly, C.J. and Abdul Ghani, J.*) SAMPANGIRAMIAH *v* SUBBA RAO. **Mys.L.J. 529=42 Mys.H C R. 564.**

——*Alienation—Father—Necessity —Recital in sale deed that it was for discharging decree debts—Value of—Reasonable belief by alienee—Sufficiency.*

A recital that a sale deed was in discharge of decree debts would be *prima facie* evidence of a representation made by the alienor at the time of the transaction. As actual proof of the necessity is not necessary for the validity of the alienation and reasonable belief in the existence of necessity will be enough, it can be presumed when the vendee is dead, that the vendee believed in the representation and took the sale. Proof of existence of decree debts subsisting against the father at the time of alienation and of reasonable belief in representation that money was needed for discharge of such debts are sufficient to justify the alienation. Such alienation is valid and binding on the sons. (*Venkataramana Rao, J.*) RAMA RAO *v.* VENKATA SUBBAYYA. **173 I.C. 3**

HINDU LAW—Alienation.

=10 R..M 566=46 L.W. 309=A.I.R. 1937 Mad. 274.

———*Alienation—Father—Power to alienate son's interest after partition—Prepartition debts — If can justify.*

By partition between son and father they became divided in status and the father can no longer have the powers which he would have as the head of the undivided Hindu family. Though notwithstanding the partition the son will continue liable for the debts of the father contracted before partition, yet under such circumstances the father would have no power to dispose of the son's interest in the family property even for the purpose of discharging such debts. Nor can a creditor who has only obtained a decree against the father bring to sale in execution family property so as to affect the interests of the son who had in the meantime become divided. (*Varadachariar and Mockett, JJ.*) VEERAYYA *v.* VENKATA BHASHYAKARALA RAO BAHADUR. I.L.R. (1937) Mad. 66=168 I.C. 294=9 R.M. 551=1936 M.W.N. 1176=44 L.W. 861=A.I.R. 1936 Mad. 887.

———*Alienation—Father—Power to alienate son's share—Conditions—Antecedent debt — Illegality or immorality—Burden of proof—Mortgage and sale—Distinction between.*

A Hindu son is under a pious obligation to pay his father's debt which is not illegal, immoral or *avyavaharika.* But this does not empower the father to alienate his son's share in the ancestral property except for a legal necessity or for the benefit of the family or for the payment of an antecedent debt not incurred for immoral or illegal purposes. Once it is proved that there was an antecedent debt, genuinely independent of the subsequent transaction of alienation, or that the alienee inquired and believed in good faith that such a debt existed, and that the alienation was made for satisfying that debt, the burden of proving the immoral or illegal character of the debt lies on the son who impugns the alienation. The burden is not discharged by merely showing that the father was leading an extravagant and dissolute life; it must be proved that the particular debt was incurred for immoral purposes or was connected with some act of morality. If tbe son fails to prove this, it is not necessary to consider whether the antecedent debt was incurred for any legal necessity or benefit of the family. In the case of a sale, it would not be set aside if a substantial portion of its consideration was required for a legal necessity or benefit of the family, or to pay off an antecedent debt not illegal or immoral, although the remaining portion was not so required. If the sale itself was justified, then it would be upheld as a whole. In the case of a mortgage, however, that part of the consideration alone which is found to have been for legal necessity or benefit or for payment of an antecedent debt justifying the alienation, would be a charge on the son's interest on the son's share in the property, the other part which is not so but which is, however, found to have been borrowed for a purpose not illegal or immoral, would be an unsecured debt of the father which the son is under a pious obligation to pay. ((*Beaumont, C.J. and Lokur, J.*) RAGHUNATH RAMCHANDRA *v.* RAMCHANDRA NARAYAN.

HINDU LAW—Alienation.

187 I.C. 70=12 R.B. 401=41 Bom.L.R. 779=A.I.R 1939 Bom. 396.

———*Alienation—Father—Sale by—Part consideration alone proved—Effect—Right of vendee to possession as against sons of the alienor.*

Though in the case of an ordinary sale if a part of the consideration has not been paid, the failure to pay the consideration would not necessarily involve the failure of a suit by the vendee for possession, that rule cannot be applied to the case of a sale by a Hindu father in which questions of Hindu law would arise. A proof of Rs. 2,375 only out of a consideration of Rs. 4,000 is not sufficient to support a sale so as to entitle the vendor to possession of the family property sold as against the sons. (*Wort and Manohar Lall, JJ.*) JUTHAN RAM DUBEY *v* RAMAN RAM TEWARI. 1938 P.W.N. 75=4 B.R. 620=175 I.C. 632=11 R.P. 6=A.I.R. 1938 Pat. 263.

———*Alienation — Father—Sale by — Validity—Proof of consideration—Duty of alienee—Legal necessity and antecedent debt—Distinction, if any —Necessity to prove bulk of consideration in each case.*

There is no justification for making any distinction between a consideration for an alienation by way of sale by a Hindu father as for legal necessity, and a consideration which is of the nature of an antecedent debt. The question in all cases is this: whether the consideration is of such a character as to support the transaction. Legal necessity and antecedent debt are entirely on the same footing to this extent that as it is necessary to prove the bulk of the consideration in the one case, it is necessary to prove the bulk of the consideration in the other also, (*Wort and Manohar Lall, JJ.*) JUTHAN RAM DUBEY *v.* RAMAN RAM TEWARI. 1938 P.W.N. 75=4 B.R. 620=175 I.C. 632=11 R.P. 6=A.I.R. 1938 Pat. 263.

———*Alienation—Father—Sale of joint family property by--Necessity—Proof—Duty of alienee —Recitals as to debts—Effect of—Specification of debts.*

Where the recitals in a deed of sale of family property executed by a Hindu father are of the vaguest description, it is reasonable to require that the alienee should have made some inquiries as to the alleged debts for discharging which the sale took place, and should have been careful either to see that the satisfaction of the debts is specifically mentioned in the sale deed or to get entries in the documents evidencing the debts themselves that they have been satisfied. (*Broomfield and Sen, JJ.*) SHANTAYA KOTRAYA *v.* MALLAPPA BASAPPA. 179 I.C. 33=11 R.B. 216=40 Bom.L.R. 1029=A.I.R. 1938 Bom. 500.

———*Alienation—Father's alienatian and manager's alienation—Distinction—Alienation to discharge antecedent debts—Binding nature of—Necessity to prove legal necessity.*

There is a well-established distinction under the Hindu Law between the powers of a manager in respect of the shares of coparceners who are his sons and in respect of the shares of other coparceners. A manager who is a father can charge the joint family property with the payment of his own antecedent debts not tainted with illegality or immorality because the sons are under a pious obligation to discharge their father's debts, and that obligation can be enforced against the family

property; but a manager who is not a father has no right to mortgage or charge the family property for the payment of his own debts. In the case of an alienation by a manager who is not a father, it must be shown that the debts on which the alienation is founded were incurred for legal necessity. (*Beaumont, C.J. and Lokur, J.*) SHIDAYA *v.* BASAPRABHAPPA. **I.L.R. (1939) Bom. 413=183 I.C 568=12 R.B 110=41 Bom.L.R. 441=A.I.R. 1939 Bom. 301.**

——Alienation—Guardian—Alienation by. *See* HINDU LAW—GUARDIANSHIP.

——*Alienation—Illegal transfer by adult members—Collusion with minors—Scrutiny—Necessity.*

Per *Stone, C. J.*—A case which bears all the signs of collusion between the adult members of the family who are accused of being parties to the illegal transfer of family property and the minor members who appear as innocent plaintiffs not in *pari delicto* either with the vendor or the purchaser and attack the transfer, calls for careful scrutiny. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **I L.R. (1939) Nag. 1 =177 I C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B).**

——*Alienation—Joint family — Alienation by member—Right of alienee—Suit for partial partition.*

A purchaser of a small portion of the joint family property from one of the co-owners can sue for partition only of the land purchased by him, and the Court can decree his suit if the parties would not be in any way prejudiced or inconvenienced thereby. (*Syed Nazim Ali, J.*) TARINI CHARAN CHAKERBUTTY *v.* DEBENDRA LAL DAY. **68 C L.J. 114.**

——*Alienation—Joint family—Benefit of the estate—Test—Considerations.*

It is impossible to give a precise definition of the expression "benefit of the estate" applicable to all cases. Whether or not a particular transaction is beneficial will depend on the particular circumstances of each case. The purpose of a loan may be necessary; yet the debt may not be necessary if the property was yielding decent income; the alienation would be much less necessary if the amount is so small that it could have been raised on personal security. Hence where family property which yields sufficient income is alienated for paying off arrears of land revenue, the alienation cannot be said to be for the benefit of the family. (*Stone, C. J. and Niyogi, J.*) GANPATRAO *v.* ISHWAR SINGH **181 I.C. 559=11 R.N. 473=A.I.R. 1938 Nag. 482.**

——*Alienation—Joint family—Benefit to estate—Mortgage by manager of joint family to pay off pre-emption decree—Validity.*

Apart from the question of legal necessity, it is open to the manager of a joint family to mortgage ancestral property in order to benefit the family and the family estate. Accordingly a mortgage executed by the manager along with practically all the adult members of the family in order to raise money to pay off a pre-emption decree is binding upon the family, if the acquisition of fresh property is beneficial to the estate and is in the best interests of the family. (*Collister and Bajpai, JJ.*) SOHAN LAL *v.* ZORAWAR SINGH. **168 I.C. 33=1937 A.W.R. 1=1937 A.L. J. 73=9 R.A. 606=1937 A.L.R. 286=A I.R. 1937 All. 219.**

——*Alienation—Joint family—Binding nature—Difference between mortgage and sale.*

A mortgage and a sale transaction stand on a different footing. A sale is either wholly good or bad; a mortgage can be good in part, or capable of being supported as to part, and if it should appear that part of the consideration is for necessity that part would be binding. (*Stone, C J. and Niyogi, J.*) GANPAT RAO *v.* ISHWAR SINGH **I.L. R. (1940) Nag. 20=180 I.C. 827=11 R.N. 399 =A.I.R. 1938 Nag. 476.**

——*Alienation—Joint family—Coparceners—Mortgage deed by two brothers—Deed signed by only one—If valid as to executant's share.*

A mortgage deed purporting to be by two brothers of a joint family, but signed by one of them only, is binding on the executant at least to the extent of his share irrespective of the fact whether the executant as a manager intends to bind his other brother by it. It is not so if it is proved that it is agreed that the liability of the executant is conditional upon other signing it. (*Stone, C. J.*) GANPAT RAOJI *v.* ABDULJI CHANDJI. **I.L.R. (1938) Nag. 160=169 I.C. 23= 9 R.N. 311=A.I.R. 1937 Nag. 54.**

——*Alienation—Joint family — Coparcener—Mortgage by—Deed reciting mortgagor to be separate—Mortgagor really joint — Subsequent partition in family—Right of mortgagee to proceed against property allotted to mortgagor on such partition—Right as against subsequent transferees for value—Failure of latter to prove want of notice—Effect—T. P. Act, S. 43.*

A mortgage by a Hindu coparcener of his undivided share is not void *ab initio*, but is only voidable at the option of the other members of the joint family or any one of them. Where a Hindu coparcener executes a mortgage of certain property reciting in the mortgage deed that he is separate from the other members of the family, and subsequently on a partition the mortgagor gets properties allotted to him, the mortgage lien is transferred to the property which he gets on such partition. The mortgagee is entitled to enforce his security against such property even against subsequent transferees of such property for valuable consideration in the absence of proof that transferees were transferees without notice. S. 43 of the Transfer of Property Act applies to the case. (*Courtney-Terrell, C.J and James, J.*) KHARAG NARAYAN *v* JANKI RAI. **16 Pat. 230=169 I C. 906=3 B R. 684=10 R.P. 94=18 Pat.L.T. 569=A.I.R. 1937 Pat. 546.**

——*Alienation — Joint family—Coparcener—Mortgage by—Suit against his widow—Maintainability.*

Where a mortgagee from a member of a joint Hindu family sues the widow of that member alone after his death on the basis that her husband had died divided, when it is found by the Court that the family is not divided but continued joint, the suit has to be dismissed on the ground that it is brought against one who had no interest in the property in question. The other members had acquired by survivorship the interest of the deceased member and so the widow

could not represent the estate. (*Bennet and Verma, JJ.*) BANSIDHAR UPADHYA *v.* MST. GUJRATI. 1939 A.W.R. (H.C.) 615=A I.R. 1939 All. 688.

———*Alienation—Joint family — Coparcener—Powers of—Father temporarily absent abroad—Sale by son—Absence of necessity—Validity—Subsequent return of father—Change of patta of lands in alienee's name at father's instance—Effect of—If acquiescence or ratification—If estops father from challenging alienation—Evidence Act, S.* 115—*Transfer of Property Regulation, S.* 54.

Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being for the family. The father is, in all cases naturally, and in the case of minor sons, necessarily, the manager of the joint family property. A younger member of a joint family such as a son, is authorised to deal with the family property only in exceptional or extraordinary circumstances, such as, reason of distress, calamity affecting the whole family, the support of the family, or the absence of the father in a remote country. But the temporary absence of the father from the locality for a short time is not sufficient to clothe the son with the powers of a manager to deal with the family property, when there is nothing to show that he is in any remote country, or that his whereabouts are not known or that his return within a reasonable time is out of question or not anticipated. And when there is no evidence of any pressure on the estate or urgent necessity an alienation of family property by way of sale by a son cannot be binding and valid as against the share of the father or any member other than the alienor. The fact that the father after his return home gets the patta of the properties transferred in the name of the alienee cannot give the alienee any title, because title to land cannot be transferred by mere admission in view of the Transfer of Property Regulation which requires a registered document for that purpose. Nor can the act of the father in transferring the patta be taken as an acquiescence in or ratification of the alienations so as to estop him from challenging the alienation. The change of patta cannot be regarded as a representation by the father which affects the alienee in any way, and on which the appellant can be said to have acted. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SIDDAPPA *v.* LINGAPPA. 16 Mys.L.J. 32=42 Mys.H.C.R. 669.

———*Alienation—Joint family — Coparcener—Power to alienate with manager's oral consent.*

A transfer of immovable property cannot be made by a junior member of a joint Hindu family even if the father who is the managing member has given an oral consent. (*Bennet, J.*) GHASITEY MAL *v.* HAR PARSAD. 166 I.C 37=9 R.A. 474=1937 A L.J. 90=1937 A L R. 123=1936 A.W.R. 1264=A.I.R. 1937 All. 99.

———*Alienation—Joint family — Coparcener—Purchaser of part of family property from one member getting possession—Remedy of other coparceners—Transferee from one of the latter—Rights and position of—Right to sue to set aside alienation and for possession.*

The law in Bombay is that if the purchaser of a part of the joint property belonging to a Hindu joint family has obtained possession, the non-alienating coparceners would be entitled to joint possession of the property with him, and if they sue for it, a decree for joint possession can be made. They may also sue in such a case for recovery of possession of the whole property sold to the purchaser; but the Court is not bound to make a decree in ejectment and generally declares that the purchaser is entitled to hold the property until partition as a tenant-in-common with the other coparceners. If the non-alienating coparceners do not wish to be in joint possession of the property, their remedy lies in a suit for partition. A transferee from one of these coparceners is not, therefore, entitled, by himself, to challenge the alienation and to sue to recover possession of the property. But if he represents the non-alienating members, different considerations would arise. He can challenge the alienation on the ground that the property alienated forms part of the joint family property and that the alienor had no authority to alienate the same so as to bind the family. But this contention can be given effect to only if a general account is taken and the sale is not void *in toto*. Whether the sale should be set aside in its entirety or partially set aside can only be determined if a general account is taken, that is to say, in a suit for partition. (*Rangnekar, C.J. and Tyabji, J.*) ACHUT SITARAM *v* SHIVAJI RAO. 170 I C 172=10 R. B 64=39 Bom. L. R. 224=A. I. R. 1937 Bom. 244.

———*Alienation—Joint family — Coparcener—Suit by others to declare it void to extent of their shares—Share of alienee—Determination—Material date—Date of alienation or date of suit.*

Where an alienation of joint family property has been made by a coparcener, and other coparceners bring a suit for a declaration that the alienation is void to the extent of their shares, the share to which the alienee would be entitled is to be determined with reference to the date of alienation and not to the date of the institution of the suit. (*Pandrang Row, J.*) VISWESRA RAO *v.* VARAHANARASIMHAM. 172 I.C. 666=10 R.M. 478=1937 M.W.N. 296=A.I.R. 1937 Mad. 631.

———*Alienation—Joint family—Duty of lender—Proof of necessity—Coparceners not contesting suit—If entitles lender to decree.*

Where a manager of a joint Hindu family borrows money for legal necessity and the lender wants to make the whole property liable for the debt inclusive of the shares of the other members, he has to prove before he can get a decree, the existence of the necessity and that he made enquiries. Though the coparceners may not appear and contest the suit, that cannot entitle the lender to a decree without the proof of the facts mentioned above. The Court has to be satisfied about these before a decree is passed. (*Misra, J.*) RAM KRISHNA DAS *v.* NIMAI BHAR. 179 I C. 892=11 R A. 394=1938 A L J. 1049=1938 A.W.R. (H.C.) 760=A.I.R. 1939 All. 72.

———*Alienation — Joint family — Manager — Assignment of decree by one of two* kartas*—Validity—If can be questioned by stranger to family.*

An assignment of a decree by one of the two *kartas* of a joint family cannot be challenged by a

person who is not a member of the joint family. The assignment is not void *ab initio*, but is only voidable at the option of the other coparcener s. (*Fasl Ali and Meredith, JJ.*) RAM KUMAR RAM SARAFF *v.* MOHAN LAL MAHARAJ. 6 B.R 256=185 I C. 788=12 R.P. 421=21 Pat.L.T. 363=A. I.R. 1940 Pat. 270.

———*Alienation - Joint family—Manager—'Benefit of estate'—Acquisition of new property.*

It may now be taken to be the settled law that there is nothing in the Hindu Law to prevent the head and manager of a joint family from doing anything in the interest of the family which any other prudent manager may do. The test should always be whether the transaction entered into by the head or manager was advantageous and for the benefit of the estate. There is no hard and fast rule as to what constitutes "the benefit to the estate" and it must vary according to circumstan es of each case. There can be circumstances in which the acquisition of new property, by pre-emption or otherwise can be held to be justified by legal necessity. Also, in certain circumstances, it may be held that such acquisition was a beneficial and prudent act such as would justify a mortgage of joint Hindu family property by a manager. But the fact showing that the transaction was beneficial and prudent must be proved, the acquisition of new property, with money raised upon a mortgage need not necessarily be of benefit to the estate. (*Thomas and Zia-ul-Hasan, JJ.*) BRIJ MOHAN LAL *v* SARABJIT SINGH. 13 Luck. 597=171 I.C. 286=1937 O.L.R. 537=10 R.O. 103=1937 O.W.N. 978=A.I.R. 1937 Oudh 513.

———*Alienation—Joint family—Manager—Benefit of the family—Purchase of lands.*

From no point of view can it be said to be beneficial to a joint Hindu family for the manager to purchase property for which the family is unable to pay and when the family is unable to pay, it is certainly not for the benefit of the family that a liability should be cast upon the joint family ancestral property. (*Bennet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHATI AKHARA UDASI NIRWANI. 183 I.C 270=12 R A. 110=1939 A L.J. 604=1939 A.W.R. (H.C.) 350 =A.I.R. 1939 All. 486.

———*Alienation—Joint family—Manager—Benefit of the family—Saving of a sister's son's property.*

The saving of the property of a sister's son is not a purpose which could be legal necessity for a joint Hindu family to justify a borrowing, by the manager; for the sister's son belongs to another family and his property is unconnected with that of the joint family. (*Bennet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHAITI AKHARA UDASI NIRWANI. 183 I.C. 270=12 R A. 110=1939 A.L.J. 604=1939 A.W.R. (H.C.) 350 =A.I.R. 1939 All. 486.

———*Alienation—Joint family—Manager—Binding character—Part of consideration not applied for benefit of family—Effect—Sale and mortgage —Distinction.*

In the case of a sale of family property effected by the manager of a Hindu joint family, if it were shown that the sale was necessary, the sale cannot be impugned by showing that part of the consideration money had not been applied for the benefit of the family; the sale must either be upheld or set aside and cannot be held good in part and bad in part. But this principle does not apply to the case of a mortgage. A mortgage may be good to the extent of the mortgage-money applied for the benefit of the family estate and bad beyond that amount. (*Beaumont, C.J. and Lokur, J.*) SHIDAYA *v.* BASAPRABHAPPA. I.L.R. (1939) Bom. 413=183 I C 568=12 R.B. 110=41 Bom. L.R. 441=A.I.R. 1939 Bom. 301.

———*Alienation—Joint family—Manager—Justification.*

The possibility of the manager's interest in the joint Hindu family property being brought to sale would not justify a manager to mortgage the whole of the joint family property for a liability which was a personal one of his own. (*Bennet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHAITI AKHARA UDASI NIRWANI. 183 I.C. 270=12 R A. 110=1939 A.L.J. 604=1939 A.W.R. (H.C.) 350=A.I.R. 1939 All. 486.

———*Alienation—Joint family—Manager—Mortgage by—Binding nature—Purchase of lands for family—If justifying necessity for alienation—Consent of coparceners—Effect of.*

A manager of a joint Hindu family is not justified in purchasing property by executing a mortgage of family properties and raising a loan therefor, merely because the purchase is a prudent one. But when the purchase is clearly beneficial to the estate and has been approved by the other coparcener or coparceners, it must be held sufficient to establish that it is for the benefit of the estate so as to bind the coparceners as well as their sons. (*Beaumont, C J. and Lokur, J.*) SHIDAYA *v.* BASAPRABHAPPA. I.L.R. (1939) Bom. 413=183 I.C. 568=12 R B. 110=41 Bom.L.R. 441=A.I.R. 1939 Bom. 301.

———*Alienation—Joint family—Manager—Mortgage by—Enforceability against other coparceners or their shares in the family property—Burden of proof.*

If a party takes an alienation by way of mortgage from a person who has only limited powers over the property concerned, such as manager of a joint Hindu family, and wishes to enforce his alienation (mortgage) not only against the alienor himself, but also against other persons (coparceners) interested in the property or their interests in the property, it is for him to make out the circumstances which entitled the alienor to make the alienation to that extent against others than himself. (*Reilly, C.J. and Chari, J.*) SAMBAYA SETTY *v.* RUDRAPPA. 14 Mys.L.J. 491=42 Mys. H C.R. 163.

———*Alienation—Joint family—Manager—Mortgage by, to pay off pre-emption decree—Minor members retaining property so acquired—Whether entitled to repudiate.*

In a suit on a mortgage executed by the manager of a joint family in order to pay off a pre-emption decree, the minor members who are impleaded as defendants should not be permitted to retain the property acquired through pre-emption and at the same time to repudiate the transaction whereby they came into possession thereof. (*Collister and Baipai, JJ.*) SOHAN LAL *v.* ZORAWAR SINGH. 168 I.C. 33=1937 A W.R. 1= 9 R.A. 606=1937 A L.R. 286=1937 A.L.J. 73= A.I.R. 1937 All. 219.

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——Alienation — Joint family — Manager—Mortgage by—Portion of debt not for necessity—Payment by mortgagor—Mortgagee's power of appropriation. *See* CONTRACT ACT, S. 60. **58 All 791=1936 A.L.J. 1224=A.I.R. 1937 All 1 (F.B.).**

——*Alienation—Joint family—Manager—Mortgage for acquiring new lands—Binding nature of.*

A *karta* of a joint family is entitled to hypothecate ancestral lands for the purpose of acquiring other lands, and the transaction is binding on the other members provided it is for the benefit of the family. The test in each case is whether the transaction is such as a prudent owner in the ordinary course of management would enter into in order to benefit the estate. (*Agarwala and Rowland, JJ.*) BAIJNATH TAKUR *v.* SARWAN. **6 B R. 369=186 I.C 438=12 R.P. 501=A.I R 1940 Pat. 423.**

——*Alienation—Joint family—Manager—Mortgage of family property for acquiring new properties — Validity and binding character of—Transaction approved by all adult members as being beneficial to family - Creditor advancing loan honestly and* bona fide*—Effect.*

The karta of a Hindu joint family is merely a manager and not an absolute owner, and the Hindu Law has, like other systems of law, placed certain restrictions and limitations upon his power to alienate family property. But the lawgivers could not have intended to impose any such restrictions on his power as would virtually disqualify him from doing anything to improve the condition of the family. He has authority to alienate 'for the sake of the family," or "for purposes of the family," in other words for purpose of "benefit to the family." The only reasonable limitation which can, therefore, be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager would thus not be entitled to enter into any transaction which may be speculative or fraught with risks or which may involve a possibility of loss to the family, and the Courts will not encourage him either to part with the joint family or to encumber it merely in order to increase the immediate income of the family by purchasing new properties, because a prudent person would not sacrifice a certain and stable income in favour of the prospect of a better income. But there are cases in which in certain peculiar and exceptional circumstances the alienation of a part of the joint family property by a karta for the acquisition of a new property would be upheld. Where the adult members of the family approve of the new purchase, regarding it as highly beneficial to the family, with the knowledge available to them and possessing all the necessary information about the means and requirements of the family, and the creditor taking a mortgage advances the loan honestly and after being satisfied that the karta is acting for the benefit of the estate, a mortgage by the karta for the purpose of purchasing new properties for the family must be upheld. (*Courtney-Terrel, C.J. and Fazl Ali, J.*) BAIJNATH PRASAD *v.* BINDA PRASAD SINGH. **17 Pat 549=180 I C 147=11 R P. 463=19 Pat L.T. 919=5 B R. 368=1938 P.W.N. 853=A I.R. 1939 Pat. 97.**

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——Alienation — Joint family — Manager—Mortgage to finance new venture—If binding on family. *See* HINDU LAW—JOINT FAMILY—BUSINESS. **17 Pat. 386.**

——*Alienation — Joint family — Manager—Necessity—Benefit to estate—Threatened sale of share of one coparcener in execution—Alienation to raise money to prevent sale—Validity.*

The danger of the share of one of the coparceners of a joint Hindu family being attached and sold in execution to a stranger is not such as to give rise to a legal necessity so as to justify the manager in alienating joint family property in order to prevent such a sale. Nor can the keeping of a stranger out of the joint family property be regarded as conducive to the benefit of the family estate which would entitle the manager to alienate joint family property so as to bind the interests of both the adult and the minor coparceners. (*Wadia and Sen, JJ.*) SABHACHAND *v.* SAMBHOO. **169 I.C. 153=9 R B. 428=39 Bom.L R. 118=A I.R. 1937 Bom. 182.**

——*Alienation — Joint family — Manager—Necessity—Facts to be shown by lender—Necessity purpose and necessity for loan.*

For an alienation by manager to be valid, what has to be shown is that the loan is for legal necessity, not that the money is wanted, or is stated to be wanted, and enquiries confirm that want for a necessary purpose. The difference is important. Where the manager has, to the knowledge of the lender, large available resources, and actual cash at hand, he cannot bind the estate if he borrows ostensibly to pay land revenue. The purpose is necessity, but there is no necessity for the loan, where there are apparently large resources, a large income and an unencumbered estate. The lender must show not merely a necessary purpose but a necessity for the loan. If, after reasonable enquiries, he, as a reasonable man, is satisfied of that necessity, that is sufficient; he is not concerned with a misapplication of the money lent, but it must be the necessity for the loan that he must satisfy himself about. (*Stone, C.J and Niyogi, J.*) GANPAT RAO *v.* ISHWAR SINGH. **I.L.R. (1940) Nag 20=180 I.C. 827=11 R.N. 399=A.I.R. 1938 Nag. 476.**

——*Alienation — Joint family — Manager—Necessity or benefit—Mortgage by manager—Money borrowed and spent to assist in prosecution of murderer of member of family—If binding on the family.*

Although it has never been doubted that money spent in defending a member of a Hindu joint family in a criminal charge is a legal necessity, taking the words "legal necessity" and "family benefit" in their ordinary sense, money borrowed and spent in order to assist in the prosecution of a person accused of the murder of a member of the family cannot be held to be a debt binding upon the family so as to justify an alienation by way of mortgage of family property by the manager. (*King, J.*) MARUTHAPPAN SERVAI *v.* NIRAIKULATHAN SERVAI. **I.L R (1937) Mad. 943=169 I.C. 292=9 R M. 735=45 L.W. 217=1937 M W N. 87=A I.R. 1937 Mad. 434 = (1937) 1 M.L.J. 331.**

——*Alienation—Joint family—Manager—Necessity and benefit—Proof—Recitals in mortgage deed—Value of.*

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A recital in a mortgage deed is not necessarily any evidence of the truth of the statements contained therein nor is a person debarred from proving other facts not recited in the document which would go either to validate or invalidate a document executed by the manager of a joint family when the question arises as to how far the family property is bound thereunder. (*Collister and Bajpai, JJ.*) SOHAN LAL *v.* ZORAWAR SINGH. **168 I.C. 33=1937 A.W.R. 1=1937 A L.J. 73=9 R.A. 606=1937 A L.R. 286=A.I.R. 1937 All. 219.**

———*Alienation— Joint family —Manager— No benefit to estate—Admission of debt between members* inter se—*No communication to alienee—If amounts to ratification.*

A manager of a joint Hindu family raised a loan by way of mortgage which was not for the benefit of the family. In a subsequent agreement among the brothers this debt was admitted by them but the agreement was not communicated to the mortgagee.

Held, that the agreement did not amount to ratification of the mortgage debt by the other brothers. There could be no ratification of a contract unless it is communicated to the other side or that subsequent actions show an approbation of the contract. (*Stone, C.J. and Niyogi, J.*) GANPATRAO *v.* ISHWAR SINGH **181 I.C. 559=11 R.N. 473=A.I.R. 1938 Nag. 482.**

———*Alienations— Joint family — Manager — Powers of—Alienation to pay family debts—Binding nature of.*

A joint family property may be alienated by the manager of the joint family to pay-off joint family debts, and such alienation is binding upon the coparceners irrespective of the fact that the manager has described himself in the transaction as manager or not. It is equally beyond doubt that an auction-sale held in execution of a decree passed against him might have the same result. (*Rupchand Bilaram and Mehta, A.J.Cs.*) BHAGWANDAS *v.* RADHAKISHIN. **30 S.L.R. 42=164 I. C. 69=9 R. S. 37=A.I.R. 1936 Sind 87.**

———*Alienations — Joint family — Manager — Powers of—Alienation without describing himself as guardian—Validity.*

The manager of the Hindu family is the manager of the whole family property whether his coparceners are minors or majors. He is competent to alienate the joint property for necessary purposes and the mere fact that he did not describe himself as guardian of the minors will not render the mortgage a void transaction. (*Coldstream and Bhide, JJ.*) CHHAJU MAL *v.* MULTAN SINGH. **167 I.C. 916=9 R.L. 571=A.I. R. 1936 Lah. 996.**

———*Alienation—Joint family—Manager—Ratification after majority—Requirements.*

No man, contract apart, is bound finally to a choice whether to affirm or disaffirm or an expression of opinion as to the binding nature of a contract unless (1) he has thereby in some way brought his decision to the knowledge of the other side, or (2) his subsequent actions shown an approbation of the contract the binding nature of which upon him is in question. Hence for ratification or affirmation by adults of an alienation made during their minority by a managing member of a joint Hindu family there must be communication to the alienee by the ratifiers before the act becomes irrevocable. (*Stone, C.J. and*

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———*Alienation—Joint family— Manager—Sale by—Legal necessity—Sale by one of the sons to discharge debts due by father not tainted with immorality—If justified—Other sons—If bound.*

The karta of a joint Hindu family is entitled to sell family property for a debt really due by the family, and even a debt barred by limitation may validly form part of the consideration for the sale of family property. Hindu Law does not recognise technical pleas as that of limitation, and in any case does not insist on evasion of payment of just debts. The payment of the debts contracted by a father not tainted with immorality or illegality which could not be paid without the sale of family property constitutes legal necessity which would justify a sale of family property by his son. Such a sale would bind not only his share but also his brothers' shares, they too being bound equally with their brother to pay their father's debts. The fact that the debt is barred by limitation or that the creditor could not have obtained a decree against the sons owing to insufficiency of stamp in the instrument evidencing the debt would not invalidate the alienation,so long as the debt is really due from the family. (*Niamatullah and Verma, JJ.*) RAM SINGH *v.* SRI CHARAN. **1938 A.L J. 12=1938 A.W.R. 31 (H.C.)=174 I. C. 311=1938 A.L.R. 267=10 R.A. 558=A.I.R. 1938 All. 147.**

———*Alienation — Joint family — Manager or father—Validity.*

While a Hindu is bound by any transfer of his interest in the joint family property made by his father to satisfy his antecedent debt, that is, a debt which was already in existence on the date of the transfer, he will not be bound by any transfer affecting his interest if it is made by a manager who is not his father unless it was made to satisfy a debt which was borrowed for legal necessity. (*Niyogi, J.*) CHUNNILAL DHURAJMAL *v.* CHAKKILAL. **172 I.C. 493=10 R.N. 217=A.I.R. 1937 Nag. 327.**

———*Alienation — Joint family — Necessity — Marriage expenses of male coparcener—Dayabhaga school.*

Under the Dayabhaga school of Hindu Law, the marriage expenses of a male coparcener are to be met out of the entire joint estate. A sale of the joint estate for the purpose of raising money for meeting such expenses is, therefore, valid. (*Sen, J.*) MON MOHAN BHATTACHARJEE *v.* BIDHU BHUSAN DUTT. **12 R.C. 334=185 I.C. 6=69 C.L. J. 188=43 C.W.N. 295=A.I R. 1939 Cal. 460.**

———*Alienation — Joint family— Necessity — Mortgage held to be not binding on joint family—Validity of its terms—How determined.*

When once a mortgage is held not to be binding on the joint family, the principle governing the joint family would not apply to the mortgage. The validity of the terms of the mortgage will have to be determined under the provisions of the Contract Act and not under the provisions of the Hindu law relating to a joint Hindu family. A valid contract is binding on the parties, and unless the mortgagor or his representatives show that the contract was not valid, they would be bound by the terms of the contract. (*Harries and Ganga Nath, JJ.*) BANARSI DAS *v.* COLLECTOR OF SHAH-

RANPUR. 165 I.C. 498=9 R.A. 287=1936 A.L.J. 1262=1936 A.W.R. 887=1936 All.L.R. 923=A.I.R. 1936 All. 712.

———*Alienation — Joint family — Necessity — Proof—Recitals—Value of.*

Recitals in mortgages or deeds of sale of the existence of necessity are admissible in evidence, but they are not evidence by themselves of the fact. (*Thomas and Zia-ul-Hasan, JJ.*) BED NATH *v.* RAJESHWARI DEVI. 13 Luck. 357=168 I.C. 725=9 R.O. 498=1937 O.L.R. 314=1937 O.W.N. 825=A.I.R. 1937 Oudh 406.

———*Alienation—Joint family—Necessity —Retention of money with vendee and drawing from time to time.*

Where an alienor needs money for maintenance and leaves part of the consideration with the alienee and takes money out of it as it is needed, it cannot be said that the alienation is not justified by legal necessity. Similarly money might be needed for the marriage or education of children which might take place after alienation. (*Thomas, C.J. and Ganga Nath, J.*) RAMADHIN SINGH *v.* GAJRAJ SINGH. 1939 A.L.J. 358=183 I.C. 789=12 R.A. 167=1939 A.W.R. (H.C.) 342=A.I.R. 1939 All. 513.

———*Alienation—joint family—Setting aside—Burden of proof—Minors not born at the time of mortgage.*

Where certain minor members of a joint Hindu family, who were not born at the time of the mortgage of family property by the adult members, challenge it and prove that there was at the time of the transaction another brother of theirs who has since died, the minors have discharged the burden of proof which originally lay on them and thereafter the burden lay on the mortgagee to prove that that brother though born prior to the execution of the mortgage also died prior thereto, if he desired to deprive the minors of their right to challenge the mortgage. (*Benniet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHAITI AKHARA UDASI NIRWANI. 183 I.C. 270=12 R.A. 110=1939 A.L.J. 604=1939 A.W.R. (H.C.) 350=A.I.R. 1939 All. 486.

———*Alienation—Joint family—Setting aside—Long lapse of time—Value of recitals in conveyance—Presumption to fill in details—Permissibility.*

Where an alienation made by a step-mother over 40 years ago is questioned on the ground of want of necessity and where there is no evidence at all except the recital in the conveyance.

Held, that in such a case, recitals could be taken into consideration and further it was open to the Court to make presumptions to fill in details which have been obliterated by time. (*Leach, C.J. and Venkataramana Rao, J.*) VENKAYAMMA *v.* SITARAMARAJU. 173 I.C. 951=10 R.M. 664=1938 M.W.N. 1126=48 L.W. 800=(1938) 1 M.L.J. 157.

———*Alienation—Joint family—Setting aside—Minor not alive at the time of mortgage.*

Where at the time of a mortgage of family property by the father there was a son who subsequently died, and another son later on challenges the mortgage on the ground of want of legal necessity, it could not be said that it has to be proved that there was no gap between the death of one son and the birth of another, in order to entitle him to challenge the alienation. (*Bennet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHAITI AKHARA UDASI NIRWANI. 183 I.C. 270=12 R.A. 110=1939 A.L.J. 604=1939 A.W.R. (H.C.) 350=A.I.R. 1939 All. 486.

———*Alienation—Joint family—Setting aside—Minor not alive on the date of mortgage—Competency to challenge—Limits of the rule as to.*

Granting that a minor born after the execution of the mortgage where there was no minor existing at the time of execution cannot raise the question of want of legal necessity, it cannot be said that the rule will apply in a case where the Court has held that the mortgage transaction can be validly challenged in regard to certain items. (*Bennet and Verma, JJ.*) SURAJPAL SINGH *v.* PANCHAITI AKHARA UDASI NIRWANI. 183 I.C. 270=12 R.A. 110=1939 A.L.J. 604=1939 A.W.R. (H.C.) 350=A.I.R. 1939 All. 486.

———*Alienation—Joint family—Son—Alienation of ancestral property by son—Rights of widowed mother.*

Per *Rupchand Bilaram, A.J.C.*—It is competent for a son to sell any ancestral property even if the alienation defeats the rights of his widowed mother, which are neither secured by any decree nor charged by agreement on the alienated property. If the widow mother is not made party to a litigation on such alienation and she has any rights, it is open to her to enforce those rights by separate proceedings. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) DAYARAM CHAINRAI *v.* KARUMAL KOTUMAL. 172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.

———*Alienation—Joint family—Validity—Facts to be proved—Long lapse of time—Presumptions to fill in details.*

In order to prove the validity of an alienation, a transferee ought to prove either that there was legal necessity in fact or that he made proper and *bona fide* inquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity where there has been a long lapse of time since the alienation, it is not reasonable to expect such full and detailed evidence of the circumstances which gave rise to the sale as in the case of alienation at a more recent date and presumptions are permissible to fill in the details which have been obliterated by time. (*Thomas, C.J. and Ganga Nath, J.*) RAMADHIN SINGH *v.* GAJRAJ SINGH. 183 I.C. 789=12 R.A. 167=1939 A.L.J. 358=1939 A.W.R. (H.C.) 342=A.I.R. 1939 All. 513.

———*Alienation—Legal necessity—Mortgage by all adult members—Money raised for purchasing new properties for family in place where family already owns lands—Mortgage—If valid as being for legal necessity.*

Legal necessity justifying an alienation of ancestral property by the karta of a Hindu joint family should not be confined to transactions of a purely defensive nature. If transactions are entered into by the manager or by the adult members which benefit the family and the estate, and are such as a reasonably prudent man would en-

ter into, they can be said to be supported by legal necessity. Where all the adult members of a family join in executing a mortgage of family property to raise money for the purpose of purchasing fresh property for the family in village, where the family already owns property, with a view to increasing the holding to make it more productive and economic, and it is clear from the evidence that the purchase is, from the financial point of view, a profitable transaction, it must be held that it is for the benefit of the family and eminently one which a reasonably prudent manager would enter into. In such circumstances the manager and the adult members are entitled to raise money and to charge the family property with the re-payment of that money. (*Harries, C.J. and Manohar Lall, J.*) SHITAL PRASAD SINGH *v.* AJAB LALL MANDAR. **18 Pat. 306=5 B.R. 930=183 I.C. 323=12 R.P. 127=20 Pat. L.T. 663=1939 P.W.N. 222=A.I.R. 1939 Pat. 370.**

———*Alienation—Limited female owner—Sale by—Suit by reversioner—Limitation—Suit before and after alienor's death—Distinction.*

A reversioner who seeks to challenge an alienation by a limited female owner has two courses open to him. He may bring a suit during the lifetime of the limited owner for a declaration that the alienation is void as against him. Such a suit falls under Art. 125 of the Limitation Act and must be brought within 12 years of the date of the alienation which is challenged. He may, if he likes, wait till the female owner is dead, and then institute a suit for recovery of possession of the property alienated by avoiding the sale. Such a suit would be governed by Art. 141 of the Limitation Act, and must be brought within 12 years of the date of the death of the female limited owner. (*Khaja Mohammad Noor and Varma, JJ.*) BALDEO DAS *v.* RAGHUNANDAN DAS. **168 I.C. 326=3 B.R. 403=9 R.P. 476=17 Pat.L.T. 16=A.I.R. 1937 Pat. 105.**

———Alienation—Manager. *See* H. L. ALIENATION—JOINT FAMILY.

———*Alienation—Manager—Rate of interest—Provision for compound interest—Interest at 8 per cent. at first and 9 3|4 per cent. in case of default after five years—If excessive—Mortgagee—If bound to prove justifying necessity.*

A provision in a mortgage deed executed by the manager of a joint Hindu family for compound interest—the rate being 8 per cent. in the first instance and 9 3|4 per cent. in the event of default after five years—cannot *a priori* be held to be so improvident or excessive as to throw upon the mortgage the onus of justifying it even in the absence of a plea to that effect. Such a rate is by no means uncommon in this country. (*Varadachariar and Mockett, JJ.*) AMBALAVANA PILLAI *v.* GOWRI AMMAL. **170 I.C. 749=10 R. M. 215=1936 M.W.N. 1274=44 L.W. 467=A.I.R. 1936 Mad. 871.**

———*Alienation—Mortgage by adoptive mother—Suit against adoptive son—Plea that part of consideration is not for legal necessity—Sustainability—Sale and mortgage—Distinction.*

In a suit against an adopted son to enforce a mortgage executed by his adoptive mother it is always open to the defendant to contend that a part of the mortgage debt is not binding upon him

or upon his share of the mortgaged property on the ground that it was not borrowed for legal necessity. Although the principles to be applied in considering whether an alienation is for legal necessity are the same in the case of a mortgage and in the case of a sale, it cannot be said that the effect of a sale for a larger sum than immediate necessity requires is necessarily the same as the effect of a mortgage for a larger sum than required. What the Court has to consider in the case of a sale is whether the sale should be set aside or not. The sale is either valid or invalid. In the case of a mortgage the position of course is entirely different. A mortgage may be valid for less than the whole amount advanced, or it may be valid for the whole amount against one defendant, and for one part of the amount only against another defendant. In enforcing a mortgage the Court takes an account of what is due, and on the taking of such account, there is no reason why a reversioner, against whom the mortgage is sought to be enforced, should not take the point that, as against his interest in the mortgaged property, the mortgage, is good only for that part of the mortgage debt which was required for legal necessity. (*Beaumont, C.J. and Wadia, J.*) PURUSHOTTAM *v.* GANGADHAR. **I.L.R. (1939) Bom. 560=185 I.C. 569=12 R.B. 256=41 Bom. L.R. 931=A.I.R. 1939 Bom. 445.**

———*Alienation—Mother—Alienation for benefit of soul of last owner—Validity.*

The Hindu Law, no doubt, recognizes the validity of an alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. But where the most substantial consideration for the sale-deed was not conducive to the benefit of the soul of the last owner, namely, the son and the amount, in the circumstances, was excessive, there was no justifying necessity for the alienation. (*Wort, J.*) JAGESHWAR SINGH *v.* MODNARAIN SINGH. **161 I.C. 941=8 R.P. 496=A.I.R. 1936 Pat. 426.**

———*Alienation — Necessity—Proof—Mortgage by manager—Major portion of consideration found binding—Presumption as to balance—Duty of creditor.*

In the case of an alienation by way of mortgage executed by the eldest of four brothers forming a joint Hindu family, and their maternal uncle as the testamentary guardian of the other three brothers who are minors—the father having appointed the uncle as their guardian by will—the alienation must in law be regarded as one entered into by the eldest brother as manager of the family, as the maternal uncle, whose appointment as guardian is invalid, cannot in law be regarded as guardian of the minors. When the proper application of a substantial portion of the consideration of the mortgage, to the extent of Rs. 7,300 out of the amount of Rs. 8,000, shown as the amount borrowed under the mortgage, has been proved as having gone in discharge of binding debts of the family, the Court might in the absence of circumstances creating suspicion presume that the small balance, about which there is no proof is also likely to have been required and applied for proper purposes. There is no distinction between a mortgage and a sale in the

application of this rule of evidence. Further, once the necessity of the mortgage is proved, a *bona fide* lender is not bound to see to the actual application of the money lent. (*Varadachariar and Mockett, JJ.*) AMBALAVANA PILLAI *v.* GOWRI AMMAL. **170 I.C. 749=10 R.M. 215=1936 M.W.N. 1274=44 L.W. 467=A.I.R. 1936 Mad. 871.**

———*Alienation—"Necessity" and "benefit to the estate"—If identical in meaning.*

The terms "necessity" and "benefit to the estate," as applied to alienations by the manager of a Hindu joint family are two separate tests and not merely two different expressions conveying necessarily the same meaning. It is no doubt true that when there is a pressure on the estate or it is threatened with danger, and the pressure or the danger, as the case may be, is removed the estate is necessarily benefitted thereby; but it does not follow that every case of benefit must also be a case of necessity or protection of the estate from danger. (*Courtney Terrell, C.J. and Fazl Ali, J.*) BAIJNATH PRASAD *v.* BINDA PRASAD SINGH. **17 Pat. 549=180 I.C. 147=11 R.P. 463=19 P.L.T. 919=5 B.R. 368=1938 P.W.N. 853=A.I.R. 1939 Pat. 97.**

———*Alienation—Necessity—Burden of proof—Suit by minor members—Plaint making vague allegations of fraud.*

Prima facie it is for the lender either to prove legal necessity or that he made reasonable enquiry as to the necessity and that the facts represented to him were such as, if proved, would have justified the loan, and where there are minors, the fact that all the adult members consented to an alienation is not, by itself, proof of legal necessity. Where however some minor members of a family brought a suit for a declaration that a certain mortgage of family property effected by adult members was without legal necessity and hence void and not binding on them, but the plaint contained only vague and general allegations of fraud, collusion and negligence on the part of the adult members and their transferee and gave no particulars whatsoever.

Held, that the onus of proving lack of necessity was on the minor plaintiffs. (*Lort Williams, J.*) PROFULLA CHANDRA *v.* BISSESSWAR SINHA. **179 I.C. 501=11 R.C. 569=A.I.R. 1938 Cal. 778.**

———*Alienation—Setting aside—Alienation by daughter with consent of major son—Right of sons of minor son to impeach.*

Certain property from father came into possession of a daughter. She along with her eldest son, who was a major, sold the property. The minor son died, leaving behind him his two sons and elder brother. The two sons of the minor brought a suit to set aside the sale by their uncle and grandmother.

Held, there never arose any occasion when the father and uncle of the plaintiffs could blend the property inherited from their maternal grandfather with their property inherited from father and grandfather. The property in question passed out when it was in the hands of their mother. Hence the plaintiffs could not claim interest in the property jointly with their father. They could claim only through their uncle, who became the sole owner of their property after the death

of their father, and as the uncle was estopped, because he was a party to the sale, the plaintiffs, his successors, too were estopped. (*Bajpai, J.*) MT. MAJNA *v.* BHAGWATI PRASAD. **164 I.C. 193 =9 R.A. 122=1936 A.L.J. 1230=1936 A.W.R. 691=A.I.R. 1936 All. 557.**

———*Alienation—Setting aside—Right of after-born son—Cause of action.*

The cause of action or the right to attack or resist an alienation by a Hindu father without necessity and without the consent of his sons is a cause or right that is in those members of the family that are alive at the time of the alienation and are not consenting. The right to attack begins to exist at the moment of the alienation, and at the highest exists in all members of the family that exist while such right of action is in tact. If that right of action is lost by those members of the family who have it when it arises, by the operation of the statute of limitation, it is lost to the family as a whole and does not live on in some child who becomes a coparcener later on even during the lifetime of the coparceners that are in existence when the alienation takes place. The right of action is lost not only by the existing coparceners but also by any member of the family later born. So also, if it is lost by those in existence at the time of the alienation by reason of their death before there comes into existence an after-born son, the latter also loses it; for he has no right of action in himself, no individual and separate cause of action springing up at his birth; his right to contest, if any is derived from the right that those in existence at the time of the alienation had. That right is lost to him when it is lost to them, and it is lost to them when they die or when they permit the period of limitation to expire. (*Madhavan Nair and Stone, JJ.*) VISWESWARA RAO *v.* SURYA RAO. **59 Mad. 667 =163 I.C. 712=9 R.M. 46=43 L.W. 349=1936 M.W.N. 163=A.I.R. 1936 Mad. 440=70 M.L. J. 360.**

———*Alienation—Sole surviving coparcener—Powers of—Adoption of son by widow of deceased coparcener—Alienations by sole surviving coparcener before and after adoption—Validity—Distinction—Debts incurred before adoption—If justify alienation.*

It is well-settled that a sole surviving coparcener under the Hindu law is entitled to dispose of the coparcenary property as if it were his private property. He may sell or mortgage the property or he may make a gift of it. But the fact that the sole surviving coparcener can alienate the properties at a time when he is solely entitled can hardly justify the conclusion that he can alienate them when he has ceased to be solely entitled, in satisfaction of his private debts. When a sole surviving coparcener contracts debts but does not alienate the family property to pay them or create any charge on the property in respect of them, the question whether the debts are binding on a coparcener who subsequently comes into the family (he not being a son of the sole surviving coparcener), *e.g.*, when the widow of a deceased coparcener adopts a son, must depend simply on whether they would have bound him if he had been a member of the family when they were incurred. That is to say, when an alienation takes

place after the family has once again become a coparcenary in the true sense, legal necessity or family benefit or *bona fide* inquiry into these matters must be proved in the ordinary way, and in the absence of such proof the new coparcener's share will not be bound. Any alienation made by the sole surviving coparcener after the adoption of a son to her husband by the widow of a deceased coparcener will not bind the adopted son unless the alienee proves legal necessity or benefit or *bona fide* inquiry as to such necessity or benefit. The fact that the alienation is in respect of a debt incurred before the adoption by itself cannot validate the alienation. (*Broomfield and Macklin, JJ.*) SHANMUKHAPPA *v.* RUDRAPPA. **183 I.C. 667=12 R.B. 119=41 Bom.L.R. 223=A.I.R. 1939 Bom. 266.**

———*Alienation—Validity—Right to challenge—Mortgage by Hindu father—Second mortgagee taking mortgage subject to first—Right to question validity of first mortgage.*

A stranger cannot question a transaction which is recognised by the principal person whose interests are affected by it. Where a Hindu father executes a mortgage of joint family property, a second mortgagee from him who has clear notice of the fact that that mortgage, subject to which he has taken his own mortgage, was entered into for legal necessity, cannot raise the question that in fact there was no necessity for the first mortgage. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA. **40 Bom.L.R. 539=177 I.C. 290=11 R.B. 74=A.I.R. 1938 Bom. 388.**

———Alienation—Widow. *See also* H. L. WIDOW—ALIENATIONS.

———*Alienation—Widow—Absence of legal necessity—Effect of.*

An alienation made by a widow of property inherited by her, without legal necessity and without the consent of next reversioner, is not binding on the reversioners but is nevertheless binding on her so as to pass her own life-interest to the alienee. (*Ranjitmal and Sukhdeonarain, JJ.*) DHOKALSINGH *v.* KEVALRAM. **1939 M. L. R. 139 (Civ.).**

———Alienation—Widow—Alienation in excess of powers—Right of reversioners to affirm and take benefit of. *See* H. L. WIDOW—ALIENATION. **1940 M.W.N. 19.**

———*Alienation—Widow—Authority of—Alienation to discharge debts of father-in-law—Validity.*

It is the religious duty of a widow to pay off the debts of her deceased husband or her father-in-law; and it is within her authority to alienate her husband's estate to pay off the debts due by her deceased father-in-law. (*Ismail, J.*) RAM ADHAR MISIR *v.* JAGNOO MISIR. **1937 A.W.R. 1223=1937 A.L.J. 1311=174 I.C. 82=1938 A. L.R. 237=10 R.A. 546=A.I.R. 1938 All. 100.**

———*Alienation—Widow—Charitable or religious purpose—Dedication of property—Powers.*

It would be very difficult to hold that the dedication of 3|4 of the estate of the deceased by his widow to an idol, could possibly be supported on the view that it was a dedication of a reasonable portion of the property. (*Thomas, C.J. and Yorke, J.*) DEBI DAYAL *v.* SRI RADHA KRISHUN.

14 Luck. 595=180 I.C. 888=11 R.O. 264=1939 O.L.R. 214=1939 O.W.N. 346=A.I.R. 1939 Oudh 145.

———*Alienation—Widow—Consent of reversioners—Consent obtained by false representations—Reversioner's right to recover property.*

Where the consent of a reversioner to an alienation by a widow is obtained by false representations as to the existence of legal necessity made by her to him, the reversioner is not precluded from recovering possession of the alienated property from the alienee, who was aware of the fact that there was no legal necessity and did not pay any consideration to the widow for the sale. (*Nasim Ali and Henderson, JJ.*) HARENDRA NATH MUKHERJI *v.* HARI PADA MUKHERJI. **I.L.R. (1938) 2 Cal. 492=182 I.C. 852=12 R. C. 106=A.I.R. 1939 Cal. 387.**

———*Alienation—Widow—Consent of reversioner—Effect.*

When a document of transfer supported by consideration is executed by a Hindu widow and the document is consented to by the next reversioner, that consent in itself affords *prima facie* evidence of legal necessity and it is not necessary for the transferee to adduce evidence of legal necessity beyond the evidence of the consent. (*Bajpai, J.*) KAULESHWAR *v.* RAM KISHORE. **185 I.C. 644=12 R.A. 339=1939 A.W.R. (H. C.) 611=A.I.R. 1939 All. 699.**

———*Alienation—Widow—Consent of reversioners—Effect of.*

Under Hindu Law, mere consent of reversioners does not validate an alienation by a widow in the absence of legal necessity. Such consent affords only a presumptive proof of legal necessity and can be rebutted by contrary proof. (*Nasim Ali and Henderson, JJ.*) HARENDRA NATH MUKHERJI *v.* HARI PADA MUKHERJI. **I.L.R. (1938) 2 Cal. 492=182 I.C. 852=12 R. C. 106=A.I.R. 1939 Cal. 387.**

———*Alienation — Widow — Co-widows—Power of alienation—Consent of both—Necessity—Religious endowment.*

A Hindu widow is ordinarily entitled to make an endowment of a small portion of her deceased husband's estate, but when there are two widows, one cannot make it without the consent of the other, for they take a joint interest in the estate and no alienation could be effected without the consent of either. (*Thom, C.J. and Ganga Nath, J.*) TEMPLE OF SHRI MADAN MOHANJI *v.* KRISHNA KUAR. **I.L.R. (1939) All. 977=181 I.C. 648=12 R.A. 430=1939 A.W. R. (H.C.) 756=1939 A.L.J. 1001=A.I.R. 1940 A. 57.**

———*Alienation—Widow—Discharge of husband's time-barred debt—Mortgage for the purpose of validity—Later mortgage to be barred claim in respect of earlier mortgage—Binding nature.*

Where a Hindu widow mortgages property to pay off the time-barred debt of her husband it is an alienation binding on the reversioners. But where later on she executes a fresh mortgage to pay off her earlier mortgage and finally executes another mortgage to pay off the claim under the prior one which had by that time become time-

barred the last mortgage is not binding on the reversioners for this reason that it was executed only to pay off the widow's time-barred debt and not the time-barred debt of her husband which had become extinguished by the first mortgage itself. (*Zia-ul-Hasan and Radhakrishna, JJ.*) CHANDRIKA PRASAD *v.* BHAGWAN DAS. **15 Luck. 167=12 R.O. 180=185 I.C. 105=1939 O.W.N. 1028=1939 A.W.R. (C.C.) 292=1939 O.L.R. 692=A.I.R. 1940 Oudh 93.**

———*Alienation—Widow—Gift to an idol—Consent of reversioner—Validating effect—Extent.*

Where the transfer by a Hindu widow is one for a pious purpose of 3|4 the whole estate, there is no legal necessity, or if at all only to a degree quite out of proportion to the extent of the transfer effected. The consent or promise of the reversioner cannot validate a transfer otherwise bad and the consenting reversioners and those who claim through them cannot be held to be bound by it. Their consent amounts to nothing more than a promise without consideration to treat the alienation as valid at some future date. It does not come within the doctrine of estoppel or the doctrine of election or the doctrine of ratification, and the only doctrine, within the scope of which it can be brought, is the doctrine of definitive election. (*Thomas, C.J. and Yorke, J.*) DEBI DAYAL *v.* SRI RADHA KRISHUN. **14 Luck. 595=180 I.C. 888=11 R.O. 264=1939 O.L.R. 214=1939 O.W.N. 346=A.I.R. 1939 Oudh 145.**

——— *–Alienation—Widow — Imprudent transaction.*

The mere fact that a widow entered into an imprudent transaction is no evidence of fraud alleged to be practised by her on reversioners. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. **176 I.C. 129=4 B.R. 682=11 R.P. 51=A.I.R. 1938 Pat. 281.**

———*Alienation—Widow—Lease neither prudent nor for benefit—Validity.*

The fact that a lease for a term of years executed by a Hindu widow holding a limited estate was neither prudent nor for the benefit of the estate would not avoid the lease, but would merely make it voidable at the option of the reversioners on the determination of the widow's life-interest. (*Lord Porter.*) JUGAL KISHORE NARAYAN SINGH *v.* CHAROO CHANDRA SUR. **I.L.R. (1939) Kar. 249=11 R.P.C. 256=41 Bom. L.R. 1055=1939 M.W.N. 963=70 C.L.J. 402=1939 A.W.R. (P.C.) 101=20 P.L.T. 407=181 I.C. 341=1939 P.W.N. 385=5 B.R. 647=43 C.W.N. 758=1939 O.L.R. 331 =A.I.R. 1939 P.C. 159=(1939) 2 M.L.J. 793 (P.C.).**

———*Alienation—Widow — Legal necessity—Alienation for expenses of litigation for protecting widow's right to estate and to prove her title to possession—Validity.*

A Hindu widow is perfectly entitled to protect her right to the estate by challenging a transfer of the estate made by the reversioners and proving her title to remain in possession of the property during her lifetime. Reasonable expenditure incurred by her in such litigation to protect her interest is perfectly valid and is recognised by law, and would justify an alienation by her. (*Ismail, J.*) RAM ADHAR MISIR *v.* JAGNOO MISIR. **1937 A.W.R. 1223=1937 A.L.J. 1311=174 I.C. 82=1938 A.L.R. 237=10 R.A. 546=A.I.R. 1938 All. 100**

———*Alienation — Widow — Legal necessity —"Janeo" ceremony of daughter's daughter's son.*

The "Janeo" ceremony of a daughter's daughter's son does not constitute legal necessity for an alienation by a Hindu widow. (*Varma and Rowland, JJ.*) RAM LAL SINGH *v.* LALJI MISSER. **5 B.R. 781=182 I.C. 561=12 R.P. 28=20 P.L.T. 773=A.I.R. 1939 Pat. 287.**

———Alienation — Widow — Legal necessity—Pilgrimage to Gaya—Reversioner's right to challenge. *See* CUSTOM (PUNJAB)—ALIENATION—WIDOW. **A.I.R. 1939 Lah. 554.**

———*Alienation — Widow — Legal necessity—Proof—Consent by reversioner—Presumption.*

Consent of the reversioner to an alienation made by the widow is presumptive proof of necessity and the presumption may be controverted by other evidence. (*Madhavan Nair and King, JJ.*) THIMMANNA BHATTA *v.* RAMA BHATTA. **179 I.C. 173=11 R.M. 523=A.I.R. 1938 Mad. 300.**

———*Alienation — Widow—Legal necessity—Proof — Recitals in document—Value of—Absence of recitals of necessity—Lapse of time—Effect of.*

The recitals in old documents are sufficient proof in support of the deed. Where the validity of an alienation made by a Hindu widow of her husband's property comes in question a long time after the alienation, so that it is impossible to ascertain what were the circumstances in which it was made, presumptions are permissible to fill in the details which have been obliterated by time and it is open to the Court to assume that the alienation was made for necessity so as to be valid even though the deed of alienation does not contain recitals of such necessity. (*Madhavan Nair and King, JJ.*) THIMMANNA BHATTA *v.* RAMA BHATTA. **179 I.C. 173=11 R.M. 523 =A.I.R. 1938 Mad. 300.**

———*Alienation — Widow — Legal necessity —Duty of alienee to make inquiry.*

While dealing with a male karta of a joint Hindu family it may be enough for the purchaser to satisfy himself that a previous zarpeshgi which he redeemed was for consideration but in case of a Hindu widow an antecedent debt is of no effect unless such debt itself was incurred for necessity. (*Varma and Rowland, JJ.*) RAM LAL SINGH *v.* LALJI MISSER. **5 B.R. 781=182 I.C. 561=12 R.P. 28=20 P.L.T. 773=A.I.R. 1939 Pat. 287.**

———*Alienation — Widow — Mortgage for raising money to build house—Validity—Legal necessity—Widow residing with relations and allowing husband's house to fall into disrepair—Effect of.*

Where a Hindu widow, who allows her husband's house to fall into a state of disrepair, herself residing with her relations, a mortgage executed by her for the purpose of raising money

to enable her to build a house cannot be held to be supported by legal necessity. (*Agarwala, J.*) SURADHANI DEBI *v.* PRALHAD MAHI. **6 B.R. 912=190 I.C. 83.**

———*Alienation—Widow — Necessity—Proof—Recitals in deed—Value of.*

The recitals as to the existence of legal necessity in a deed of transfer by a Hindu widow cannot by themselves be relied upon for the purpose of proving the facts contained therein. If such facts are admitted, the right of reversioner would always be defeated by insertion of carefully prepared details. (*Nasim Ali and Henderson, JJ.*) HARENDRA NATH MUKHERJI *v.* HARI PADA MUKHERJI. **I.L.R. (1938) 2 Cal. 492==182 I.C. 852=12 R.C. 106=A.I.R. 1939 Cal. 387.**

———*Alienation — Widow — Setting aside by reversioner—Mesne profits—Right to—Assessment of mesne profits—Date from which awardable—Money found payable to alienee—Interest on—Right to.*

Where a Hindu reversioner sues for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the date of the widow's death and the reversioner is entitled to mesne profits as from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to the date of suit. Even in cases in which the reversioner is directed to pay a certain sum of money as representing the portion of the consideration found binding on the estate, it must be held that the persons in possession are only entitled to claim interest on the amount found payable and are not on that account any the less liable for mesne profits. Where no mesne profits are awarded for certain period between the death of the widow and the commencement of the three years prior to the date of suit, no interest need be allowed in the alienee's favour either during that period. (*Varadachariar and Abdur Rahman, JJ.*) KRISHNAMURTHY *v.* SATYANARAYANA. **I.L.R. (1939) Mad. 917=188 I.C. 751=13 R.M. 73=1939 M.W.N. 848=50 L.W. 260=A.I.R. 1939 Mad. 824=(1939) 2 M.L.J. 388.**

———*Alienation — Widow—Transfer of mother's interest in her deceased son's estate—Effect of.*

A transfer by a Hindu mother of her interest in her deceased son's estate cannot be construed as transferring a mere right of management or anything less than or different from the whole interest of her as a Hindu mother in her son's estate. That interest was the interest of a limited owner and is quite correctly and naturally described as a right of enjoyment according to the Sastras. (*Sir George Rankin.*) RADHARANI DASSYA *v.* BRINDARANI. **I.L.R. (1939) Kar. 110 =11 R.P.C. 140=1939 A.W.R. (P.C.) 29 =49 L.W. 222=1939 M.W.N. 249=69 C.L.J. 174=1939 O.A. 309=41 Bom.L.R. 689 =1939 A.L.J. 596=43 C.W.N. 337=179 I.C. 615=1939 O.L.R. 83=5 B.R. 307=1939 O.W.N. 210=1939 P.W.N. 123=A.I.R. 1939 P.C. 27=(1939) 1 M.L.J. 245 (P.C.).**

———*Alienation — Widow — Validity—Election or ratification by reversioners—Doctrine of.*

An alienation by a Hindu widow is, no doubt, only voidable and it is open to a reversioner either to ratify it or elect to treat it as good. But if at the time of such ratification or election he was not aware of the real facts as to legal necessity and was, therefore, not aware of his right to avoid the alienation, the principle of ratification or election is not attracted to the case. (*Nasim Ali and Henderson, JJ.*) HARENDRA NATH MUKHERJI *v.* HARI PADA MUKHERJI. **I.L.R. (1938) 2 Cal. 492=182 I.C. 852=11 R.C. 106=A.I.R. 1939 Cal. 387.**

———*Alienation — Widow — Validity — Major portion of consideration found to be for legal necessity.*

Where the major portion of the consideration for a sale by Hindu widow is proved to have been applied for legal necessity, the whole sale must be declared good and valid. (*Zia-ul-Hasan and Bennet, JJ.*) BIKRAM SINGH *v.* MADHO SINGH. **184 I.C. 256=12 R.O. 93=1939 O.W.N. 870 =1939 O.A. 731=1939 A.W.R. (C.C.) 192 =1939 O.L.R. 595.**

———*Alienation — Widow — Legal necessity—Pilgrimage expenses—Expenses for performing religious and charitable acts.*

A Hindu widow may incur reasonable expenditure for the purpose of performing religious or charitable acts which are supposed to conduce to the spiritual welfare of the deceased owner, and for this purpose she is justified in alienating a small portion of the estate. But she is not entitled to transfer her husband's estate for pilgrimage generally. (*Ismail, J.*) RAM ADHAR MISIR *v.* JAGNOO MISIR. **1937 A.W.R. 1223= 1937 A.L.J. 1311=174 I.C. 82=1938 A.L.R. 237=10 R.A. 546=A.I.R. 1938 All. 100.**

———*Alienation—Widow—Powers of to dispose of shares of illegitimate sons of husband.*

A Hindu widow has no power to alienate her husband's estate so as to defeat the rights of the illegitimate sons of her deceased husband. The rights of the widow and the illegitimate sons of a Sudra are independent and one cannot meddle with the share of the other. A sale of the shares of the illegitimate sons by the widow for whatever purpose is ineffective. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) CHIKKAMMA *v.* NANJUNDA. **16 Mys.L.J. 184=43 Mys.H.C.R. 105.**

———*Alienation by widow—Setting aside—Suit for—Proper decree—Order for payment by one party to opposite party—Power of Court to pass.*

In a suit to set aside a transaction by a Hindu widow on the ground that it is not justified by legal necessity, the proper order for the Court to pass is that the sale should be set aside if it is not justified; if it were justified then it should stand. But no question of payment either by one party or the other to the opposite party can possibly come into the Court's consideration. Nor is the Court entitled to enquire into the consideration for the debt already owing by the widow, for the payment of which the widow alienates the property. Where therefore, in such a suit the Court, finding that of the sale consi-

deration of Rs. 2,500. Rs. 1,300 was for legal necessity but the balance was not, passed an order that the alienees would be entitled to retain possession of properties conveyed beyond the lifetime of the widow on payment of Rs. 1,200 with interest thereon.

Held, that the order was wrong and should be set aside. (*Wort and Varma, JJ.*) ALODHAN KUAR *v.* NAURANGI SINGH. **175 I.C. 473=4 B.R. 591=10 R.P. 627=A.I.R. 1938 Pat. 194.**

———Alienation — Widow — Validity — Consent of next reversioner—Effect of. *See* HINDU LAW—FAMILY ARRANGEMENT. **1938 P.W.N. 125.** *See also* HINDU LAW—WIDOW—ALIENATION.

———*Ancestral business. See* HINDU LAW. JOINT FAMILY—BUSINESS.

———Applicability — Cutchi-memons — Family partnership—If governed by Partnership Act. *See* PARTNERSHIP ACT, SS. 5 AND 69. **1937 M.W.N. 412=(1937) 2 M.L.J. 221.**

———*Applicability — Cutchi memons—Law as to succession and inheritance—Will by Cutchi memon in favour of one heir—Validity.*

In the absence of a custom to the contrary, Cutchi memons are governed by the principles of Hindu Law in matters of succession and inheritance, including both testate and intestate succession, and not by the Mahomedan Law. A will executed by a Cutchi memon in favour of one of his heirs is not therefore invalid in law. (*Rupchand Bilaram, A.J.C.*) JALALDIN *v.* AMINUDDIN. **29 S.L.R. 366.**

———*Applicability—Cutchi Memons—Property inherited by widow from husband—Nature of estate taken—Law as to reversioners and reversionary rights—Applicability of.*

The widow of a Cutchi Memon acquires an absolute estate in movables inherited by her from her husband; but this absolute estate does not include the power of willing away the property. She has only a Hindu widow's estate in the immovable property of her husband, according to the Hindu Law of succession and inheritance which applies to Cutchi Memons. The Hindu Law as to reversioners and their rights is also applicable to Cutchi Memons, as regards property inherited by a widow from her husband is concerned. (*Lobo, J.*) ZULLEKHANBAI *v.* HAJRANBAI. **I.L.R. (1940) Kar. 208=190 I.C. 303=A.I.R. 1940 Sind 117.**

———*Applicability*—Ezhuvas *of Palghat—Sons' liability for father's debts—Pious obligation—Rule of—If applies.*

The *Ezhuvas* of Palghat, who follow the *Makkathayam* system and who have adopted the rule of partibility under the Hindu Law, must be held bound also by the principle of the sons' obligation to pay their father's debts not illegal or immoral; and therefore the sons' shares in the joint family property can also be proceeded against for debts, not illegal or immoral, incurred by their father, independently of any question of family necessity. There is no warrant for introducing one portion of the Hindu Law without taking along with it other portions which form an integral part of the whole system. (*Varadachariar and Mockett, JJ.*) BALAKRISHNAN *v.* SUBRAMANIA AIYAR (CHITTOOR BANK PROPRIETOR.) **167 I.C. 706=9 R.M. 477=1936 M.W.N. 842=44 L.W. 480=A.I.R. 1936 Mad. 937=71 M.L.J. 766.**

———*Applicability — "Hindu" — Convert to Christianity—Reconversion—Proof of declaration by person concerned that he had become reconverted to Hinduism—Sufficiency—Formal ceremoney of expiation and re-conversion—If necessity.*

The deceased who was in Government service and for whose estate rival claims were made for grant of administration, was originally a Hindu, and a Brahmin by birth and became a convert to Christianity and married a Christian wife. It was alleged by his Hindu brother after his death, that the deceased changed his religion and became a Hindu by re-conversion. It was found that the case definitely set up by the brother that the deceased underwent a formal ceremony of expiation and re-conversion was false. There was also no convincing evidence to show that the deceased adopted the ways of a Hindu and observed the Hindu mode of life. But it was proved that in the service Register of the deceased the entry "Indian Christian" was changed into "Hindu Brahmin" against the deceased's name at his request, and then in two affidavits by the deceased he described himself as a Hindu.

Held, that though a formal conversion was not a prerequisite to a person becoming a Hindu the mere fact that the deceased made a declaration that he had become a re-convert to Hinduism was totally inadequate to make him a Hindu, and the deceased at the time of his death must be held to be a Christian and not a Hindu. Consequently his Christian widow was entitled to the grant of administration and not his Hindu Brother as the Hindu Law would not apply to the deceased. (*Venkatasubba Rao, Offig. C.J. and Venkataramana Rao, J.*) RAMAYYA *v.* JOSEPH ELIZABETH. **167 I.C. 488=9 R.M. 460=44 L.W. 854=A.I.R. 1937 Mad. 172.**

———*Applicability — Nairs of Malabar — If Hindus—Marumakkathayam Law—If a school of Hindu Law.*

Prima facie, any Hindu residing in a particular province in India is held subject to the particular school of Hindu Law or the customary law applicable to the class to which the said Hindu belongs and recognised in that province. This law is not merely a local law. It becomes the personal law and a part of the status of every family which is governed by it. If he does not belong to any particular class or family it would be the general doctrines of Hindu Law prevalent in that province wherein he resides. Once it is determined what the personal law of a person is, it will continue to be of obligatory force on him. It cannot be denied that Nairs of Malabar in Madras are Hindus. The Marumakkathayam law which governs Nairs, whether it is a school of Hindu Law or a customary law, is a law which prevails in the Madras Presidency of which Malabar is a part, followed and observed by a certain section of the Hindus. (*Venkataramana Rao, J.*) VENKATARAMAN *v.* JANAKI.

HINDU LAW—Applicability.

188 I.C. 826=13 R.M. 84=1939 M.W.N. 262=49 L.W. 403=A.I.R. 1939 Mad. 595=(1939) 1 M.L.J. 520.

———*Applicability—Jains.*

It is an established principle that the ordinary rules of Hindu Law apply to Jains in the absence of a special custom or usage varying the law. (*Weston.*) CHAND KOER *v.* PEM RAJ. 1938 A.M.L.J. 79.

———*Applicability — Jains — Adoption — Law governing—Presumption.*

It is well established in the Bombay Presidency that the ordinary Hindu Law of adoption applies to Jains. The Courts start with the presumption that the Hindu Law of adoption would apply to Jains, and the burden of showing any custom contrary to the ordinary principle of Hindu Law of adoption is on the party who sets it up. (*Rangnekar, J.*) HIRACHAND *v.* ROWJI SOJPAL. I.L.R. (1939) Bom. 512=184 I.C. 876=12 R.B. 203=41 Bom.L.R. 760=A.I.R. 1939 Bom. 377.

———*Applicability — Jains — Succession—Stridhan property of mother—Married daughter—Right of in presence of unmarried daughter.*

The ordinary rules of Hindu Law as to succession and inheritance must be applied to Jains in the absence of any special custom or usage varying the Hindu Law; the onus of proving such a custom or usage lies heavily on the party setting up the same. There is no rule or custom among the Jains under which a married daughter has an equal right to succeed to the *stridhan* property of her mother with an unmarried daughter. (*Collister and Bajpai, JJ.*) JAIWANTI *v.* ANANDI DEVI. I.L.R. (1938) All. 196=1937 A.W.R. 1184=1937 A.L.J. 1295=173 I.C. 366=1938 A.L.R. 122=10 R.A. 477=A.I.R. 1938 All. 62.

———*Applicability — Khojas — Testamentary capacity—Power to dispose of whole property by will—Khoja of Shiah Ishna Ashari sect.*

A Khoja of the Shiah Ishna Ashari sect can dispose of the whole of his property by a testamentary disposition. (*Chitre, J.*) FIDAHUSEIN *v.* BAI MONGHIBAI. 164 I.C. 533=9 R.B. 73=38 Bom.L.R. 397=A.I.R. 1936 Bom. 257.

———*Applicability—Korkus of Central Provinces—If Hindus—Law applicable.*

Per *Niyogi, J.*—The Korkus, an aboriginal tribe in the Central Provinces, must be held to be Hindus and governed by the Hindu Law, subject of course to proof of custom on any particular point. Even if they are not regarded as Hindus out and out, they are so far Hinduised that the Hindu Law must be applied to them on principles of justice, equity and good conscience. (*Stone, C.J. and Niyogi, J.*) ISHAKALLI *v.* THAKUR PRASAD. 20 N.L.J. 159.

———*Applicability — Lingayats — Adoption of married man—Validity.*

The ordinary Hindu Law is presumed to apply to Lingayats except in so far as it is shown that they have superseded it by their customs. In the absence of any special custom being proved among them, a married man cannot be validly adopted. (*Lord Thankerton.*) SOMASEKHARA ROYAL *v.* MAHADEVA ROYAL. 1936 A.L.J. 96=38 Bom.L.R. 317=62 C.L.J. 528=40 C.W.N. 243=1936 A.W.R. 70=43 L.W. 105=8 R.P.C. 123=1936 O.L.R. 148=1936 All.L.R. 81=1936 P.W.N. 146=2 B.R. 197=159 I.C. 1079=1936 M.W.N. 21=A.I.R. 1936 P.C. 18=70 M.L.J. 159 (P.C.).

HINDU LAW—Applicability.

———*Applicability — Mitakshara — Applicability to residents of Midnapore District—Presumption.*

There is no presumption that the Hindu residents of the District of Midnapore are governed by the Mitakshara Law. (*Mitter, J.*) SUKDEB CHARAN JANA *v.* MRITUNJOY PAL. 43 C.W.N. 395.

———*Applicability—Nambudris of Malabar—Father's and grandfather's debts—Pious obligation of son and grandson—Rule as to—Applicability of.*

The rule of Hindu Law as to the pious obligation of the son and grandson to pay the father's and grandfather's debts is not applicable to Nambudris of Malabar. (*Varadachariar and Pandrang Row, JJ.*) NARAYANA AIYAR *v.* MOORTHI KENDAN. I.L.R. (1938) Mad. 897=182 I.C. 945=12 R.M. 187=47 L.W. 532=1938 M.W.N. 364=A.I.R. 1938 Mad. 643=(1938) 1 M.L.J. 467.

———*Applicability—Panchals, if belong to regenerate class—Claim to belong to regenerate class—Tests to be applied.*

The criteria to be applied in determining a question whether a particular caste or community belongs to the twice-born classes are (1) the consciousness of the caste, (2) its customs, and (3) the acceptance of that consciousness by the other castes. Applying the above criteria it was held that the community of goldsmiths known as Panchals or Panchal Vishwa Brahmins do not belong to the twice-born classes but are Sudras. (*Broomfield and Macklin, JJ.*) KALAPPA *v.* SHIVAPPA. 39 Bom.L.R. 1282=173 I.C. 891=10 R.B. 404=A.I.R. 1938 Bom. 132.

———Applicability — Pandharia Zamindari in Bilaspur District — Impartibility — Rule of succession—Primogeniture — Applicability — Burden of proof—Widow's right to succeed Zamindar. *See* C.P. LAND REVENUE ACT, SS. 47 AND 49. 20 N.L.J. 47.

———*Applicability—Sunni Borahs of Gujarat—Inheritance and succession—Law applicable—Hindu Law of survivorship—If applicable—Exclusion of women—Custom as to—If exists—Mother—If excluded by brother.*

The law is well settled, that in the case of Sunni Borahs of Bossad Taluk as in the case of other Sunni Borahs of Gujarat, they are governed in matters of inheritance and succession by the Hindu law; the presumption is, however, limited to the law of inheritance and succession in this strict sense, *i.e.*, as applicable to the estate of a separated Hindu. But the principle of joint ownership and survivorship, understood in Hindu law, does not apply to the community. Any special custom to that effect must be proved as a fact.

Held, on the evidence, that there was no custom of exclusion of females which would defeat the claim of a mother to succeed to her son in preference to another son. (*Broomfield and Tyabji, JJ.*) BAI SAKAR *v.* ISMAIL GAFOOR. 60

HINDU LAW—Applicability.

Bom. 919=167 I.C. 380=9 R.B. 299=38 Bom.L.R. 1034=A.I.R. 1937 Bom. 65.

———*Applicability—Sunni Borahs of Gujarat—Law applicable—Widow inheriting property from husband—Nature of estate taken—Absolute estate or limited estate of Hindu widow.*

The Sunni Borahs of Gujarat are governed by the Hindu Law of succession and inheritance, though by the Mahomedan law in other respects; and a widow inheriting from her husband takes only a widow's limited estate as under Hindu Law. A gift by her to the daughter's son without consent or ratification by the daughter would cease to be effective on the death of the donor-widow. The daughter is legally the heir of her father and not of her mother and she is entitled to take the property on the death of her mother in spite of the gift. (*Broomfield and Macklin, JJ.*) NURBAI *v.* ABHRAM MAHOMED. **41 Bom.L.R. 825=186 I.C. 288=12 R.B. 313=A.I.R. 1939 Bom. 449.**

———*Applicability—Transfer of district from Madras to Bombay—Personal law of residents in that district.*

The mere transfer of a district to another presidency for administrative purposes is not sufficient to affect the personal law of the residents in that district, unless and until it is shown that in the case of any resident there that he had intended to change and has in fact changed his personal law. Where, therefore, a lady in North Kanara takes a married man in adoption after it has been transferred to the Bombay Presidency, and such adoption is invalid according to the law applicable to North Kanara, while it remained part of the Madras Presidency, such an adoption is invalid even after the transfer of the district to the Bombay Presidency, neither the lady nor the adoptee being capable of carrying out between them the adoption of a married man. (*Lord Thankerton.*) SOMASEKHARA ROYAL *v.* MAHADEVA ROYAL. **1936 A.L.J. 96=38 Bom.L.R. 317=62 C.L.J. 528=43 L.W. 105=40 C.W.N. 243=8 R.P.C. 123=2 B.R. 197=1936 O.L.R. 148=1936 All.L.R. 81=1936 P.W.N. 146=159 I.C. 1079=1936 M.W.N. 21=1936 A.W.R. 70=A.I.R. 1936 P.C. 18=70 M.L.J. 159 (P.C.).**

———Business. *See* HINDU LAW—JOINT FAMILY—BUSINESS.

———Caste—Degradation and ex-communication — Effect of on civil rights—Son of ex-communicated person—Adoption of—Validity. *See* HINDU LAW—ADOPTION. **39 Bom.L.R. 211=A.I.R. 1937 Bom. 169.**

———Conversion — Hindu — Conversion to Christianity—Re-conversion—Proof. *See* HINDU LAW—APPLICABILITY. **A.I.R. 1937 Mad. 172.**

———*Convert to Christianity—Subsequent re-conversion to Hinduism—Formal renunciation of Christianity—Proof of performance of expiatory ceremonies—Necessity for valid reconversion.*

Where a Hindu convert to Christianity again reverts to Hinduism, it is not necessary that there must be a formal renunciation or renouncement of the new religion and a re-admission to the old. It cannot be laid down that there must be proof of some formal abandonment of one religion and the adoption of another. There is no general law which makes any particular ceremony necessary before a reconversion is validated. Where it is proved that the person reverting to his old religion was accepted as a Hindu by his co-religionists without demur, and lived and died as a Hindu, without the caste insisting on any ritual, it must be held that he was validly reconverted to Hinduism. There is no warrant for holding that a formal renunciation of Christianity or proof of performance of expiatory ceremonies is essential in all cases. (*Mockett and Krishnaswami Aiyangar, JJ.*) DURGAPRASADA RAO *v.* SUDARSANASWAMI. **I.L.R. (1940) Mad. 653=51 L.W. 159=1940 M.W.N. 588=A.I.R. 1940 Mad. 513=(1940) 1 M.L.J. 800.**

HINDU LAW—Custom.

———*Custom—Kumaun — Collateral succession—Doctrine of representation—Basis of rule.*

The real basis of the Kumaun custom which modifies the rules of Mitakshara as to collateral succession is, that the estate is treated as if left by the last male in the family tree who has left male heirs. The result is that if a man dies sonless his brothers do not inherit as brothers, but as sons of the father to whom the estate is reverted on the sonless man's death. (*Bennet and Verma, JJ.*) GANGI SAH *v.* HARLAL SAH. **I.L.R. (1939) All. 122=180 I.C. 25=11 R.A. 413=1938 A.L.J. 1177=1938 A.W.R. 864=A.I.R. 1939 All. 137.**

———*Custom—Kumaun—Full and half-blood—Mitakshara—Applicability—Presumption.*

From Mr. Panna Lall's book and from Dr. Joshi's book, it is clear that there is a custom among the Khas of Kumaun that there is no difference between brothers of the whole blood and consanguine brothers and that so far as Khas are concerned the principle of full representation is allowed. It is very doubtful if this principle can be applied in the case of Maurals who are among the enlightened people of Kumaun. A Khasa residing in Kumaun will be governed by the customs mentioned in Mr. Panna Lall's book; at the same time in the case of Hindu immigrants from the plains like the Maurals, the law that will ordinarily apply to them will be the Mitakshara Law and, even if they migrate to a custom ridden place like Kumaun, they will be governed by the Mitakshara Law unless evidence of renunciation is forthcoming. (*Collister and Bajpai, JJ.*) LACHHAM SINGH *v.* JHAGAR SINGH. **I.L.R. (1939) All. 406=183 I.C. 38=12 R.A. 67=1939 A.W.R. (H.C.) 288=1939 A.L.J. 213=A.I.R. 1939 All. 437.**

———*Custom—Overriding of law—Sufficiency of evidence—Recital in the* wajib-ul-arz.

Where there is a recital in the *wajib-ul-arz* about the existence of a particular custom with reference to a class of persons and there is also evidence of persons who are in the know as to its observance, then a departure from the ordinary rules of Hindu Law is justified. (*Mehta, S. M. and Harper, J.M.*) AMREZ SINGH *v.* RAM DULAR SINGH. **1939 R.D. 199=1939 A.W.R. (B.R.) 197.**

HINDU LAW—Damdupat.

———Damdupat—*Applicability of rule — Loan by a Hindu to a Hindu and a non-Hindu jointly —Non-Hindu's right to contribution against Hindu borrower.*

The rule of *damduput* applies to a loan by a Hindu lender made on joint account to a Hindu borrower and non-Hindu borrower, so far as the Hindu borrower is concerned. It does not, however, follow that the non-Hindu joint borrower will not be entitled to claim contribution from the Hindu borrower on the basis of the sum he has actually paid, even though by reason of the rule that sum is in excess of what the lender could have recovered from the Hindu joint borrower. (*Panckridge, J.*) MAHA MAYA DASSEE *v.* ABDUR RAHIM. **I.L.R. (1937) 1 Cal. 450=172 I.C. 731=10 R.C. 413=A.I.R. 1937 Cal. 752.**

———*Damdupat—Fresh bond by debtor for aggregate amount of principal and interest due under old bond—Effect.*

The rule of damdupat does not forbid the conversion by subsequent agreement between the debtor and the creditor, of the interest in arrears into capital. Therefore, when a fresh bond is passed by the debtor for the aggregate amount of the principal and interest due under the old bond, the principal for the purpose of the rule of damdupat is the amount of the fresh bond. (*Lobo, J.*) TIKAMDAS MATHURADAS *v.* KALIANJI GORDHANDAS. **I.L.R. (1939) Kar. 693=181 I.C. 596=11 R.S. 221 (2)=A.I.R. 1939 Sind 113.**

———*Damdupat, rule of—Applicability to mortgage-debts.*

The rule of damdupat is a rule of equity and is applicable both to simple as well as to mortgage debts. In applying this rule, however, to the mortgage debts distinction has to be made between cases where the amount of the annual rents and profits is fixed beforehand by the parties and it is agreed that the mortgagee is to receive that amount in lieu of interest or part thereof irrespective of the actual amount of rent that may be recovered by him and those where no such amount is fixed and there is no such agreement between the parties so that the mortgagee is under a liability to account to the mortgagor for the rents and profits received by him. In the former cases the rule of damdupat would be applicable while to the latter cases the rule would not apply. (*Nawal Kishore, C.J., Ranjitmal and Sukhdeonarain, JJ.*) MANGI LAL *v.* BANSIDHAR. **1939 Mar.L.R. 51 (C.).**

———Dancing girls—Adoption. *See* HINDU LAW—ADOPTION.

———Daughter. *See also* HINDU LAW—GIFT, STRIDHAN, SUCCESSION AND WILL.

———Daughter—Alienation and Debt. *See* HINDU LAW—LIMITED OWNER.

———Daughters—Estate taken—Dispute between brother and daughters of deceased—Compromise allotting some properties to brother and others to daughters—Latter to take jointly and to enjoy as of right—Nature of estate taken—If absolute estate or limited estate. *See* COMPROMISE—CONSTRUCTION. **48 L.W. 939=(1939) 1 M.L.J. 170.**

———*Daughter—Maintenance and marriage expenses—Right to as against father and his property—Conditions for enforcement—Duty of daughter to obey father and submit to his care and protection.*

HINDU LAW—Daughter.

It is the natural and legal duty of a Hindu father to maintain his unmarried daughters independently of the possession of any property, and after his death, the daughters become entitled to be maintained out of his estate in the hands of his heirs. That right extends to the joint family property in the hands of the surviving coparceners after the father's death. A father is also bound in the discharge of his moral duty to marry his daughter, and that obligation is independent of the possession of any property. The right of the daughter to claim provision for marriage expenses can be enforced against the father's heirs in possession of his estate and against the joint family property in the hands of the surviving coparceners. An unmarried daughter is not, however, entitled to enforce either obligation after revolting against the father and refusing to live under his protection. The enforcement of the right which an unmarried daughter in the family has to be maintained and married by her parents independently of the possession of any property, can be conditioned only upon the readiness and willingness to surrender herself to the protection of the father, and if the latter then fails to discharge his obligation, there may be a proper cause of action for enforcing that right by a decree of Court. But where the daughter does not observe her reciprocal duty to submit to the care and custody of her father or fails to obey him in all respects, the father cannot be bound to maintain the daughter or to provide for her marriage. If the father has been proved to be vicious, corrupt and immoral, or if the father has waived his right in favour of some other person by becoming an ascetic or renouncing the world in all respects, the daughter might refuse to obey the parent. But, so long as it is not demonstrated that the father is in some way incompetent to maintain and look after the interests of his children, a Court of law will not enforce the claim of refractory daughter against the father by executing its decree against his person or property, whether inherited or self-acquired. A Hindu father cannot, notwithstanding his competence to take care of the daughter and superintend her education, be compelled to make provision *in invitum* for her maintenance and marriage even if she is kept out of his protection and custody. (*Wassoodew and Sen, JJ.*) KUSUM KRISHNAJI *v.* KRISHNAJI. **I.L.R. (1939) Bom. 396=183 I.C. 394=12 R.B. 94=41 Bom. L.R. 445=A.I.R. 1939 Bom. 271.**

———*Daughter—Savings of income—Property purchased out of—Nature of.*

Where property is purchased by a Hindu daughter out of the income of the property in which she has only a daughter's estate, her intention as to how she proposes to keep the property so purchased will be the governing factor in determining the nature of that property, apart from any question of presumption. Where such property is purchased by her in the name of her husband, there is a clear indication of an intention on her part to treat the property as her own, and the property could not be held to be an accretion to the parent estate. (*Bajpai and Ganga Nath, JJ.*) SURAJ PRASAD *v.* GULAB DEI. **1936 A.W.R. 1172**